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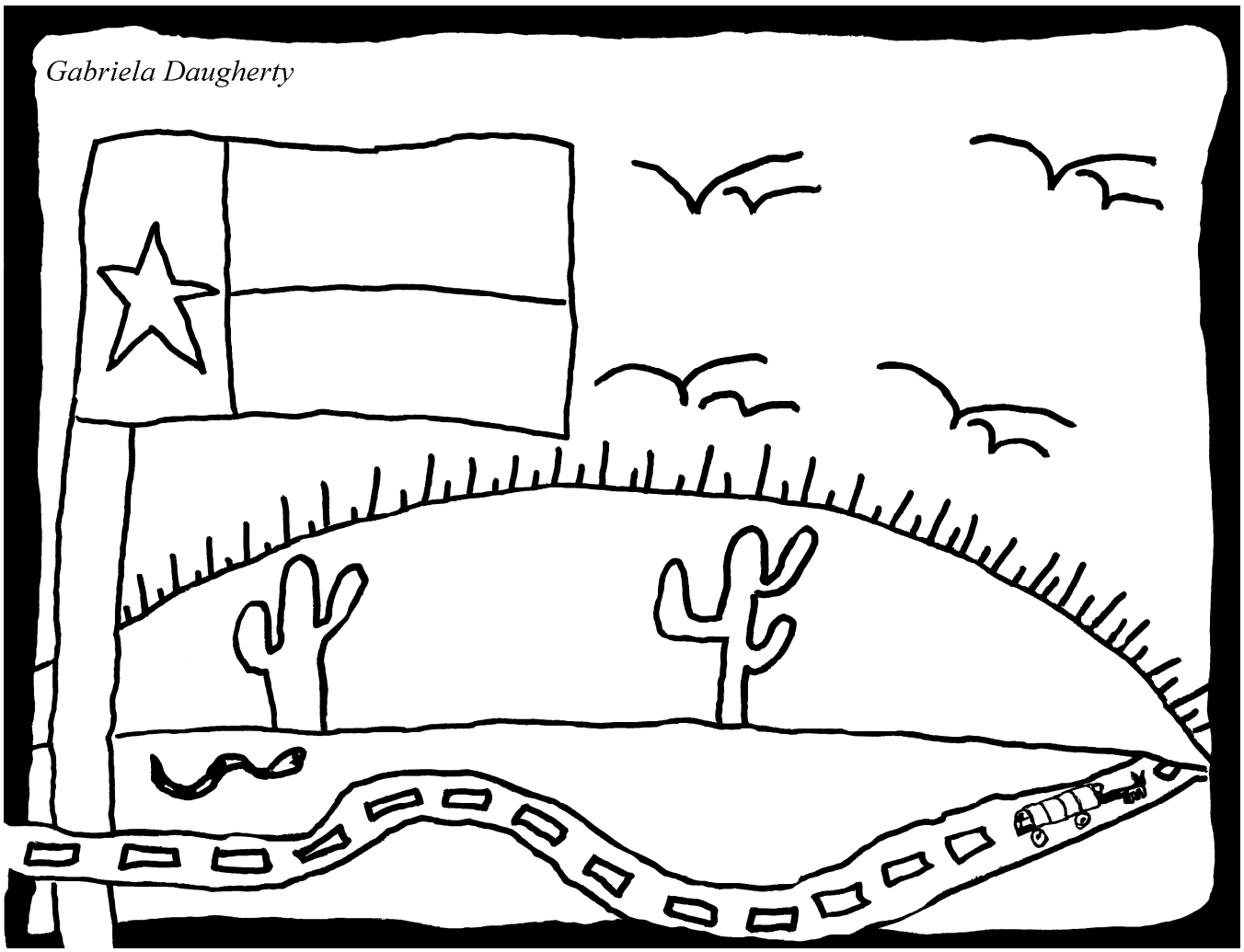

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Opinions

Opinion No. GA-0725

The Honorable David P. Weeks

Walker County Criminal District Attorney

1036 11th Street

Huntsville, Texas 77340

Re: Whether certain reservations and assignments in deeds executed by a member of a city council operate to exclude particular property from tax increment financing under Tax Code section 312.204(d) (RQ-0777-GA)

S U M M A R Y

Tax Code section 312.204(d) excludes real property owned by a member of a city's governing body from tax increment financing. It is unlikely that a city council member who in a deed conveying real property reserves to himself the sale proceeds of the property, if and when the property is sold, is the owner of the property under section 312.204(d) by virtue of the reservation. Thus, such a reservation does not by itself appear to operate to exclude property from tax increment financing under section 312.204(d).

Opinion No. GA-0726

The Honorable Hope Andrade

Texas Secretary of State

Post Office Box 13697

Austin, Texas 78711-3697

Re: Circumstances under which a foreign business entity is required to register with the Secretary of State (RQ-0778-GA)

S U M M A R Y

Whether a given foreign entity is transacting business in this state, and is thereby required to register with the Secretary of State's office under section 9.001 of the Business Organizations Code, is a fact question that will depend on the specific circumstances of that entity's business in Texas. Because this office does not find facts or resolve factual disputes in the opinion process, we cannot determine whether the scenarios you propose constitute transacting business in this state as a matter of law for purposes of the foreign entity registration requirement.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200902887
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: July 15, 2009

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.723

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.723, relating to Reimbursement Methodology for Home and Community-Based Services (HCS), under Title 1, Part 15, Chapter 355, Subchapter F.

Elsewhere in this issue of the *Texas Register,* HHSC contemporaneously withdraws its earlier proposal to §355.723, which was published in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2732).

Background and Justification

Section 355.723 establishes the reimbursement methodology for the Home and Community-Based Services (HCS) waiver program. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to: (i) describe how administrative and operations expenses are allocated to the various HCS service types, (ii) describe how the foster/companion care coordinator component of the foster/companion care rate is determined, (iii) delete language indicating that payment rates are determined annually and that state-operated HCS providers are reimbursed at cost, and (iv) clarify the current reimbursement methodology.

The Department of Aging and Disability Services (DADS) provides individualized services and supports to persons with mental retardation who are living with their families, in their own homes, or in other community settings, such as small group homes, through the HCS Medicaid waiver program. In order to receive matching federal funds, this waiver requires approval from the federal Centers for Medicare and Medicaid Services (CMS).

Under the current HCS reimbursement methodology, a monthly "Administration and Operations" fee is used to reimburse providers for certain administration and operations expenses related to various HCS services. The fee currently is a flat $938.62 per consumer per month or approximately $11,263 per annum. In 2008, a waiver renewal application was submitted to CMS for the HCS waiver program, which was set to expire August 31, 2008. As a condition of the waiver approval, CMS directed HHSC to develop and implement a new payment methodology that would incorporate administration and operations costs into the rate for covered services and to discontinue reimbursing for those expenses as a separate monthly payment. HHSC informed CMS that it anticipated implementing the new methodology in September 2009.

In response to provider concerns regarding CMS's directive, HHSC submitted a letter to CMS in October 2008 requesting that CMS reconsider its decision to redistribute the monthly fee. In January 2009 CMS reaffirmed its direction and asked HHSC to submit a corrective action plan on how it intended to redistribute the monthly fee in order to maintain federal funding for the HCS waiver program.

To come into compliance with the CMS directive, HHSC formed a workgroup and gathered feedback on possible options to redistribute the monthly administration and operations fee to the individual services in the HCS waiver. HHSC considered the feedback from the workgroup and other interested parties, including HCS providers specializing in the provision of foster/companion care services. This proposed rule reflects the results of that feedback by proposing weighting factors for distributing these costs. While this proposed weighting methodology represents a reduction in the total administration and operations reimbursement for foster/companion care services, it equalizes the administration and operations percent of the total rate for foster/companion care and residential support services.

Currently, many HCS providers pay the full foster/companion care direct services rate to individuals providing foster/companion care in order to recruit and retain foster/companion care providers. These HCS providers cover the cost of foster/companion care coordination with the funds from the monthly administration and operations fee, even though the foster/companion care direct services rate includes a foster/companion care coordinator component. To enable providers to continue funding the costs for foster/companion care coordination using administration and operations funds, the proposed rule determines a stand-alone foster/companion care coordinator component of the foster/companion care rate. This component will be funded out of the administration and operations costs prior to the allocation of the administration and operations costs to the various HCS services. As a result, providers will be able to continue funding the costs for foster/companion care coordination using administration and operations funds.

Language indicating how often payment rates are determined is being deleted because the frequency of rate determination is addressed in §355.101 of this title (relating to Introduction). Language indicating that state-operated HCS providers are reimbursed at cost is being deleted because there are currently no state-operated HCS providers and, if there were, they would

be reimbursed in the same manner as all other HCS providers. Language concerning the reimbursement methodology is being modified to clarify the rate determination process.

Section-by-Section Summary

The proposed amendment to §355.723:

Revises subsection (a) to add a title and to delete language pertaining to the frequency of rate determination.

Deletes subsection (b) as an obsolete reference to state-operated HCS providers and renumbers subsequent subsections within this section.

Revises renumbered subsection (b) to add a title and to indicate that only rates for residential support, supervised living, HCS foster/companion care, and day habilitation vary by level of need.

Revises renumbered subsection (c) to add a title and to list the cost components included in the HCS rates.

Adds subsection (d)(2) - (3) which describes how the foster/companion care coordinator component of the foster/companion care rate is calculated.

Adds subsection (d)(4) - (9) which describes how the administration and operations cost component included in the recommended rate is calculated.

Deletes subsection (e) because the cost factors listed in this subsection are now listed as cost components in renumbered subsection (c) and renumbers subsequent subsections within this section. The list of cost components in renumbered subsection (c) is identical to the list of cost factors in deleted subsection (e) except that "non-personnel operation costs" have been replaced with "operation costs."

Revises renumbered subsection (e) to add a title and replaces the term "factors" with the term "components."

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that, during the first five-year period the amended rule is in effect, there will be no fiscal impact to state government because the amendment merely reallocates existing funds across services. While some providers will receive reduced Medicaid revenues under the amended rule and others will receive increased Medicaid revenues, overall, the amendment is budget neutral. The amended rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-Business Impact Analysis

Under §2006.002 of the Texas Government Code, a state agency proposing an administrative rule that may have an adverse economic effect on small businesses must prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement estimates the number of small businesses subject to the rule and projects the economic impact of the rule on small businesses. The regulatory flexibility analysis describes the alternative methods the agency considered to achieve the purpose of the proposed rule while minimizing adverse effects on small businesses.

In 2007 approximately 273 entities provided HCS services to DADS consumers. Based on 2007 Texas Medicaid cost reports for the HCS program (the most recent data available), of these entities, approximately 188 were small businesses, of which approximately 136 were micro-businesses. HHSC considered four alternatives to come into compliance with the CMS requirements described in the "Background and Justification" section above. The Commission selected the Alternative 3 methodology for the proposed rule. Under the proposed rule, while there will be a reduction in the total administrative and operations reimbursement for HCS providers, including small businesses, specializing in the provision of foster/companion care services, the rate paid for administration and operations costs associated with foster/companion care and residential support services will be closer to the actual costs of administering and operating these services than under both the current methodology and the other alternatives considered and will represent substantially equal percentages of the direct service rate associated with these two services. The anticipated economic impact of the proposed rule is more fully described under Alternative 3 below.

HHSC considered the following four alternative approaches for complying with the CMS directive. Each alternative incorporates a weight-based allocation methodology to determine the administrative and operations reimbursement associated with each HCS service, with the weights based on the level of administrative and operations effort required to provide the various services. The CMS directive requires that administration and operations reimbursement be allocated to the various HCS services in some fashion. HHSC considered a variety of allocation methods before determining that a weight-based method based upon level of effort was the most accurate and administratively feasible method.

Commonly accepted allocation methods include units of service, salaries, labor, total costs, total-costs-less-facility-costs, and level of effort measures. To be acceptable in a specific situation, an allocation method must provide a reasonable reflection of the actual business operations and resources expended toward each unique activity.

The units of service allocation method may be used only when all services have equivalent units of service, for example, if all units of service are equal to one day or one hour. HHSC determined that the units of service method was not acceptable for allocating costs within the HCS program because the units of service for the various HCS services are not equivalent (the residential support and foster/companion care services have a unit of service of one day, the day habilitation service has a unit of service equal to a partial day, and most of the remaining HCS services (i.e., physical therapy, nursing, supported home living, etc.) have a unit of service equal to one hour.

The salaries and total costs allocation methods may be used when all services are labor-intensive without programmatic residential facility or residential building costs. HHSC determined that these methods were not acceptable allocation methods for allocating costs within the HCS program because the residential supports service includes some residential building costs.

The two remaining commonly accepted allocation methods were the labor cost and total-cost-less-facility-cost. Both of these methods require facility costs to be segregated from non-facility costs. This segregation is not possible in the HCS program because of the way day habilitation costs are recorded by many HCS providers. HCS providers often contract with non-related parties to provide day habilitation services for their consumers and pay the day habilitation provider a fixed amount per unit of service provided. This fixed amount is intended to cover the day habilitation provider's labor costs and facility

costs (day habilitation services are typically provided in a day habilitation facility). In these situations, the HCS provider is not able to segregate the day habilitation center facility costs from its non-facility costs. As a result of this inability to segregate these costs, HHSC determined that the labor and total-cost-less facility-cost allocation methods were not acceptable for allocating costs within the HCS program.

Based upon this review of commonly-accepted allocation methods, HHSC determined that a weight-based allocation methodology based on the amount of administrative and operations effort required to provide the various services was the most accurate and administratively feasible method available.

Analyses of the impacts of the various alternatives did not include the impact of additional funds appropriated for rate increases for the HCS program by the 81st Texas Legislature for the 2010-11 biennium.

Alternative 1: Alternative 1 considered allocation weights based purely on objective level of effort data collected from workgroup participants and additional HCS providers specializing in the provision of foster/companion care services. These data indicated that a unit of residential support services took three times as much effort to administer as a unit of foster/companion care services. Allocation weights for the three residential options from this data were 1.00 for residential support services, 0.33 for foster/companion care services, and 0.30 for supported home living services. Under this alternative, 88 small businesses experienced a reduction in HCS Medicaid revenues. These reductions ranged in size from $14 per annum to $753,875 per annum. Of the 136 micro-businesses, 75 experienced a reduction in HCS Medicaid revenues. These reductions ranged in size from $72 per annum to $502,924 per annum.

Under Alternative 1, the percent of each residential-setting service rate accruing from administration and operations ranged from 35.4% to 18.5% (depending on consumer level of need) for residential support services, to 25.9% to 11.7% (depending on consumer level of need) for foster/companion care services, to 44.9% for supported home living services.

Alternative 2: HHSC also considered modifying the allocation weights to build in incentives for the provision of foster/companion care. Weights were modified to calculate that a unit of residential support service requires only twice as much effort to administer as a unit of foster/companion care services. Allocation weights for the three residential options were set at 1.00 for residential support services, 0.50 for foster/companion care services, and 0.30 for supported home living. Under this alternative, 80 small businesses experience a reduction in HCS Medicaid revenues. These reductions ranged in size from $130 per annum to $336,330 per annum. Of the 136 micro-businesses, 69 experienced a reduction in HCS Medicaid revenues. These reductions ranged in size from $130 per annum to $262,162 per annum.

Under Alternative 2, the percent of each residential-setting service rate accruing from administration and operations ranged from 33.8% to 17.5% (depending on consumer level of need) for residential support services, to 38.5% to 19.2% (depending on consumer level of need) for foster/companion care services, to 43.1% for supported home living services.

Alternative 3: Alternative 3 combines a stand-alone flat fee and a weights-based allocation. Under this alternative HHSC would comply with the CMS requirements discussed above by: (i) setting a stand-alone foster/companion care coordinator component of the foster/companion care rate funded out of the administration and operations funds and (ii) allocating the remaining administration and operations funds to the various HCS services using the allocation weights presented in Alternative 2.

HHSC developed this alternative to enable providers to continue funding the costs for foster/companion care coordination using administration and operations funds as described in the "Background and Justification" section above.

Under this alternative, 70 small businesses will experience a reduction in HCS Medicaid revenues. These reductions would range in size from $30 per annum to $211,161 per annum. Of the 136 micro-businesses, 63 will experience a reduction in HCS Medicaid revenues. These reductions would range in size from $30 per annum to $128,005 per annum.

Under Alternative 3, the percent of each residential setting service rate accruing from administration and operations ranged from 32.2% to 16.5% (depending on consumer level of need) for residential support services, to 31.8% to 15.1% (depending on consumer level of need) for foster/companion care services, to 41.4% for supported home living services.

Alternative 4: Alternative 4 would set allocation weights for residential support services, foster/companion care, and supported home living equal to 1.00. Under this alternative, 98 small businesses would experience a reduction in HCS Medicaid revenues. These reductions would range in size from $18 per annum to $122,798 per annum. Of the 136 micro-businesses, 71 would experience a reduction in HCS Medicaid revenues. These reductions would range in size from $18 per annum to $43,614 per annum.

Under Alternative 4, the percent of each residential-setting service rate accruing from administration and operations ranged from 24.5% to 11.9% (depending on consumer level of need) for residential support services, to 39.0% to 19.5% (depending on consumer level of need) for foster/companion care services, to 61.7% for supported home living services.

Alternatives 1 and 2 were not selected because of the adverse impact they would have on small businesses and micro-businesses. In addition, HHSC was concerned about the impact of the reduction in funding for administration and operations expenses for foster/companion care services on HCS providers specializing in providing these services under this alternative. These alternatives were rejected in favor of Alternative 3, which incorporates a reasonable incentive to support provision of foster/companion care services.

Alternative 4 was not selected because the weights it uses to distribute administrative and operations overhead costs are contrary to all data available to HHSC and analyses of administrative and operations effort required for different services. Equalizing the weights for residential support services, foster/companion care services, and supported home living services ignores the difference between the administration and operations effort and costs for these three services. The equalization of the weights and payments for administration and operations costs for all consumers, regardless of the actual cost to deliver the service, would perpetuate the underfunding of administration and operations costs for the provision of residential services.

Alternative 3 was selected for proposal. HHSC believes that the proposed weights in Alternative 3 will more closely align payment for administrative and operations expenses with administrative effort so that services that require more effort or time to

administer and operate will be equitably compensated than any of the other alternatives. It is HHSC's position that rates should be as closely aligned with costs as possible to ensure equity, avoid false incentives, and ensure accountability for taxpayer funds. Alternative 3 also allows providers to continue funding the costs for foster/companion care coordination using administration and operations funds and comes the closest of the various alternatives to equalizing the ratio of administration and operations funds to direct care funds for the various residential settings. Finally, Alternative 3 has a negative impact on the smallest number of small businesses of any of the alternatives and has a negative impact on the smallest number of micro-businesses of any of the alternatives other than Alternative 2 which negatively impacts one less micro-business than Alternative 3.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that the rate determination methodology for the HCS waiver program will be in compliance with CMS requirements, thereby maintaining federal funding for this program. As well, obsolete and duplicative rule language will be eliminated and the reimbursement methodology will be clarified.

Public Hearing

HHSC will hold a public hearing on August 12, 2009, at 9:00 a.m. (Central Time) to receive public comment on the proposal. The hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Meisha Scott by calling (512) 491-1453, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.723. Reimbursement Methodology for Home and Community-Based Services (HCS).

(a) Prospective payment rates. HHSC sets payment rates to be paid prospectively to HCS providers [~~annually. Rates are prospective in nature~~].

[~~(b) Reimbursement rates apply to all non-state operated HCS providers uniformly by type of service component provided and the individual's level-of-need. Reimbursements for state-operated HCS providers are adjusted based on allowed costs reported at the end of the state fiscal year, in accordance with this subchapter. The state-operated cost adjustment will not exceed allowable federal maximums.~~]

(b) [~~(c)~~] Levels of need. Rates vary by level of need for residential support, supervised living, HCS foster/companion care, and day habilitation. Rates do not vary by level of need for any other HCS service.

(c) [~~(d)~~] Recommended rates. The recommended modeled rates for each HCS service type and level of need include the following cost components: direct service staffing costs (wages for direct care, direct care supervisors, benefits, modeled staffing ratios); facility costs (for respite care only); room and board costs for overnight, out-of-home respite care; administration and operation costs; and professional consultation and program support costs [~~are based on cost components deemed appropriate for a provider~~]. The determination of these components is based on cost reports submitted by HCS providers in accordance with §355.722 of this subchapter (relating to Reporting Costs by Home and Community-based Services (HCS) Providers).

(d) Administration and operation cost component. The administration and operation cost component included in the recommended rate described in subsection (c) of this section for each HCS service type is determined as follows.

(1) Step 1. Determine total projected administration and operation costs and projected units of service by service type using cost reports submitted by HCS providers in accordance with §355.722 of this subchapter.

(2) Step 2. Determine the foster/companion care coordinator component of the foster/companion care rate as follows. For fiscal years 2010 through 2013, this component will be modeled using the weighted average foster/companion care coordinator wage as reported on the most recently available, reliable audited HCS cost report database plus 10.25 percent for payroll taxes and benefits inflated to the rate period and a consumer to foster/companion care coordinator ratio of 1:15. For fiscal year 2014 and thereafter, this component will be determined by summing total reported foster/companion care coordinator wages and allocated payroll taxes and benefits from the most recently available audited cost report, inflating those costs to the rate period and

dividing the resulting product by the total number of foster care units of service reported on that cost report.

(3) Step 3. Determine total foster/companion care coordinator dollars as follows. Multiply the foster/companion care coordinator component of the foster/companion care rate from paragraph (2) of this subsection by the total number of foster care units of service reported on the most recently available, reliable audited HCS cost report database.

(4) Step 4. Determine total projected administration and operation costs after offsetting total foster/companion care coordinator dollars as follows. Subtract the total foster/companion care coordinator dollars from paragraph (3) of this subsection from the total projected administration and operation costs from paragraph (1) of this subsection.

(5) Step 5. Determine projected weighted units of service for each HCS service type as follows:

(A) Supervised Living and Residential Support Services. Projected weighted units of service for Supervised Living and Residential Support Services equal projected Supervised Living and Residential Support units of service times a weight of 1.00;

(B) Day Habilitation. Projected weighted units of service for Day Habilitation equal projected Day Habilitation units of service times a weight of 0.25;

(C) Foster/Companion Care. Projected weighted units of service for Foster/Companion Care equal projected Foster/Companion Care units of service times a weight of 0.50;

(D) Supported Home Living. Projected weighted units of service for Supported Home Living equal projected Supported Home Living units of service times a weight of 0.30;

(E) Respite. Projected weighted units of service for Respite equal projected Respite units of service times a weight of 0.20;

(F) Supported Employment. Projected weighted units of service for Supported Employment equal projected Supported Employment units of service times a weight of 0.25;

(G) Behavioral Support. Projected weighted units of service for Behavioral Support equal projected Behavioral Support units of service times a weight of 0.18;

(H) Physical Therapy, Occupational Therapy, Speech Therapy and Audiology. Projected weighted units of service for Physical Therapy, Occupational Therapy, Speech Therapy and Audiology equal projected Physical Therapy, Occupational Therapy, Speech Therapy and Audiology units of service times a weight of 0.18;

(I) Social Work. Projected weighted units of service for Social Work equal projected Social Work units of service times a weight of 0.18;

(J) Nursing. Projected weighted units of service for Nursing equal projected Nursing units of service times a weight of 0.18.

(6) Step 6. Calculate total projected weighted units of service by summing the projected weighted units of service from paragraph (5)(A) - (J) of this subsection.

(7) Step 7. Calculate the percent of total administration and operation costs to be allocated to the service type by dividing the projected weighted units for the service type from paragraph (5) of this subsection by the total projected weighted units of service from paragraph (6) of this subsection.

(8) Step 8. Calculate the total administration and operation cost to be allocated to that service type by multiplying the percent of total administration and operation costs allocated to the service type from paragraph (7) of this subsection by the total administration and operation costs after offsetting total foster/companion care coordinator dollars from paragraph (4) of this subsection.

(9) Step 9. Calculate the administration and operation cost component per unit of service for each HCS service type by dividing the total administration and operation cost to be allocated to that service type from paragraph (8) of this subsection by the projected units of service for that service type from paragraph (1) of this subsection.

~~[(e) The rates are derived for each type of service and, when appropriate, each level-of-need and include the following cost factors: direct service staffing costs (wages for direct care, direct care supervisors, benefits, modeled staffing ratios); non-personnel operating costs; facility costs (for respite care only); room and board costs for overnight, out-of-home respite care; administrative costs; and professional consultation and program support costs.]~~

(e) [~~(f)~~] Refinement and adjustment. Refinement/adjustment of the cost components [~~factors~~] and model assumptions will be considered, as appropriate, by HHSC.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902844
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 424-6900

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 77. SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

The Texas Department of Licensing and Regulation ("Department") proposes the repeal of 16 Texas Administrative Code ("TAC") Chapter 77, §§77.1, 77.10, 77.21, 77.22, 77.70, 77.72, 77.80, and 77.90 and proposes new 16 TAC Chapter 77, §§77.1, 77.10, 77.20 - 77.23, 77.40 - 77.43, 77.70, 77.80, and 77.90, regarding service contract providers and administrators.

The existing rules at 16 TAC Chapter 77 implement the statutory requirements under Texas Occupations Code, Chapter 1304, the Service Contract Regulatory Act. The Department is proposing the repeal of the existing rules and the adoption of new rules in order to clarify and reflect the current policies, practices and procedures for registering and regulating service contract providers and administrators. In addition, the new rules are necessary to clarify and detail the providers' financial security obligations and the providers' responsibilities to their service contract holders.

Proposed new Chapter 77 rules clarify and detail the registration requirements for service contract providers ("providers")

and service contract administrators ("administrators"). The proposed rules compile the existing registration requirements found throughout the statute, rules and registration forms into one comprehensive list of registration requirements. The proposed rules separate registration requirements for providers and administrators into separate rules, and separate the requirements for initial registrations and renewals into separate rules. In addition, the proposed new rules clarify and detail the financial security requirements for providers, which are set out in general terms in the statute and which are critical for ensuring the performance of the providers' obligations to their service contract holders.

The proposed rules set out the responsibilities that providers and administrators have to their service contract holders and to the Department, including providing disclosures to consumers in advertisements and in service contracts and providing updated information to the Department. The proposed rules establish new procedures that providers must follow if they cease operations in Texas but still have active service contracts in effect. Finally, the proposed rules include a fees section; however, there are no proposed changes to the fee amounts found in the existing rules.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed repeal and new rules are in effect, there will be no direct cost or effect on revenue to state or local government as a result of enforcing or administering the proposal.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed repeal and new rules are in effect, the public will benefit because the proposed rules clarify the service contract providers' financial obligations and contractual responsibilities to members of the public who purchase service contracts ("service contract holders"). The public also will benefit from enhanced disclosures that providers must give to potential and new service contract holders. Existing service contract holders will benefit from receiving at least 30-days advance notice if their service contract provider ceases operations in Texas. These service contract holders will have the opportunity to seek a refund or other resolution before the provider ceases operations. Currently, providers that are ceasing operations are not notifying service contract holders, and service contract holders are finding out weeks, months or even years later when they try to make claims on their service contracts that the provider is no longer in business.

The service contract industry will benefit because of the additional clarity and detail provided in the rules regarding registration and financial security requirements and because the rules reflect the current policies, practices and procedures of the Department.

There are approximately 203 service contract providers and 49 service contract administrators currently registered with the Department to do business in Texas. Many of these businesses are large national corporations. The Department assumes that at least some of the providers and administrators may be classified as "small businesses" or "micro-businesses" as defined under Texas Government Code, Chapter 2006. After evaluating the proposed rules, the Department believes that there will be no adverse economic effect on small and micro-businesses, but the agency anticipates that there may be minimal economic costs to persons who are required to comply with the rules as proposed. Because there may be economic costs, the agency has prepared an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002.

Most of the proposed changes in the new rules provide additional detail and clarification to the existing rules, but not additional new requirements. There will be no costs to those persons who are required to comply with the rules as a result of these changes. There are two additions to the existing rules that may result in minimal costs to providers (not administrators), but the Department has narrowly tailored the new requirements and does not anticipate an adverse economic cost to small or micro-businesses as a result of these proposed changes.

The first proposed change requires the provider to identify itself on the advertising materials that are used by the provider, its administrator or its sellers. The public often receives letters and postcards in the mail advertising various service contracts, but some of these advertisements do not provide the name of the service contract provider, just a phone number. Since service contract sellers are not registered with the Department, it is important for the public and the Department to know the name of the provider who is financially and contractually responsible for a particular service contract being advertised and whether that provider is registered in Texas to do business.

The Department has narrowly tailored this new provision to require only the name of the provider on the solicitation. The less burdensome alternative is not requiring the provider's name on the advertising, which is the current status and which leaves the public wondering whether the provider behind the anonymous advertisement is registered to do business in Texas. Other alternatives to the proposed rule would require the provider to provide additional information on the solicitations, which would probably be more burdensome and costly. The Department believes the proposed change is a reasonable solution. The Department believes that the legitimate service contract providers currently include their names on their marketing materials and that this requirement should not result in an additional cost to those providers.

The second proposed change requires a provider that is ceasing operations in the state to notify its service contract holders who have active contracts in effect and the Department regarding the fact that the provider is going out of business. The provider also must provide certain information to the Department. While there may be some minimal economic cost to these requirements, the Department finds this to be a necessary cost of properly conducting business.

The Department has experienced several instances over the last few years of providers ceasing operations and not telling their service contract holders or the Department that they were going out of business and that they would no longer be honoring the service contracts. The service contract holders only find out weeks, months or even years later when they try to make claims on the service contracts and they discover that the provider is no longer in business. The Department often finds out when it starts receiving complaints from consumers or when the provider does not renew its registration with the Department the following year. Service contract providers like any other business entity should wind down business operations in an organized and proper manner and provide notice to customers who have paid upfront and in full for service contracts (often multi-year contracts) that they will no longer be able to use the service contracts or receive the coverage for which they paid.

The Department has narrowly tailored this new requirement and has not prescribed the method or format for notifying consumers or the Department, just the timing. In addition, the Department has limited the information required to be provided to the Department to that which is necessary to identify and handle potential complaints in the future from affected service contract holders. The less burdensome alternative is not requiring the provider to notify service contract holders with active contracts or the Department when it ceases operations, which is the current status. Other alternatives to the proposed rule would require the provider to provide additional information and would prescribe the method and format for doing so, which would probably be more burdensome and costly. The Department believes the proposed rules are a reasonable solution. The Department has attempted to minimize the potential for any economic costs to persons who are required to comply with the rules as proposed, while ensuring that the necessary information is provided to the public and the Department.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

16 TAC §§77.1, 77.10, 77.21, 77.22, 77.70, 77.72, 77.80, 77.90

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Licensing and Regulation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The repeal is also proposed under Texas Occupations Code, Chapter 1304, which establishes the service contract program and gives regulatory authority of this program to the Commission and the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapters 51 and 1304. No other statutes, articles, or codes are affected by the proposal.

§77.1. Authority.
§77.10. Definitions.
§77.21. Registration and Renewal Requirements--Provider.
§77.22. Registration and Renewal Requirements--Administrator.
§77.70. Responsibilities of Registrant--Provider and Administrator.
§77.72. Financial Security.
§77.80. Fees.
§77.90. Sanctions--Administrative Sanctions/Penalties.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902850
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 463-7348

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16 TAC §§77.1, 77.10, 77.20 - 77.23, 77.40 - 77.43, 77.70, 77.80, 77.90

The new rules are proposed under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The new rules also are proposed under Texas Occupations Code, Chapter 1304, which establishes the service contract program and gives regulatory authority of this program to the Commission and the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1304. No other statutes, articles, or codes are affected by the proposal.

§77.1. Authority.

This chapter is promulgated under the authority of Texas Occupations Code, Chapter 1304 and Texas Occupations Code, Chapter 51.

§77.10. Definitions.

The following words and terms, as used in this chapter and Texas Occupations Code, Chapter 1304, have the following meanings:

(1) "Service contract seller" or "seller" means a person, other than the provider of the service contract, who is responsible for marketing, offering, or selling service contracts, but is not contractually obligated to a service contract holder under the terms of a service contract.

(2) "Third-party administration of a service contract" includes any of the following activities performed on behalf of a service contract provider:

(A) performing or arranging the collection, maintenance, or disbursement of money to compensate any party for claims or repairs pursuant to a service contract;

(B) participating in the processing or adjustment of claims arising under a service contract;

(C) maintaining records required by Texas Occupations Code, Chapter 1304; or

(D) complying with provider requirements, other than financial security requirements, of Texas Occupations Code, Chapter 1304.

(3) The term "third party administration of a service contract" does not include the performance of repairs, or clerical functions ancillary to the performance of repairs, by a repair facility that performs no other activities with respect to a service contract.

§77.20. Registration Requirements--Provider.

(a) No person may operate as a provider of service contracts, or offer to be a provider of service contracts, in this state without first registering with the Department, unless the service contracts offered by such person are specifically exempt from the application of Texas Occupations Code, Chapter 1304.

(b) A registration is valid for one year from the date issued.

(c) Initial applications for registration must provide the Department with all of the following required information, on forms prescribed by the Executive Director:

(1) a completed registration form;

(2) a completed biographical affidavit from each controlling person as defined in Texas Occupations Code §1304.0035;

(3) a completed criminal history questionnaire from each controlling person as defined in Texas Occupations Code §1304.0035, if applicable;

(4) the required fee; and

(5) proof of financial security as prescribed under §77.40.

(d) Not later than the 30th day after the date of a provider's initial registration, the provider must submit the following information to the Department:

(1) a list of internet website addresses through which a consumer may purchase the provider's service contracts, if any;

(2) a list of administrator(s) appointed by the provider, if any, including each administrator's name, assumed name, street address, telephone number, and Department registration number; and

(3) a list of sellers of the provider's service contracts, except those excluded under Texas Occupations Code §1304.1025(c)(2), including each service contract seller's name, assumed name, street address, and telephone number.

(e) Falsification of information on an application is cause for denial and/or revocation of the registration.

(f) The Department may refuse to issue a registration if the applicant or a controlling person of the applicant has violated Texas Occupation Code, Chapter 1304, this chapter, or a rule or an order issued by the Commission or Executive Director.

§77.21. Registration Renewal Requirements--Provider.

(a) In order for a provider to continue operating in this state, a registration must be renewed annually.

(b) Non-receipt of a registration renewal notice from the Department does not exempt a person from any requirements of this chapter.

(c) Renewal applications for registration must provide the Department with all of the following required information, on forms prescribed by the Executive Director:

(1) a completed registration form;

(2) the number of service contracts sold by the provider in the preceding 12-month period;

(3) the updated lists of information required under §77.20(d);

(4) a biographical affidavit from each controlling person as defined in Texas Occupations Code §1304.0035, or a form indicating there has been no change in the biographical affidavit since the previous registration or renewal from each controlling person;

(5) a completed criminal history questionnaire from each controlling person as defined in Texas Occupations Code §1304.0035, if applicable, or a form indicating there has been no change in criminal history since the previous registration or renewal from each controlling person, as applicable;

(6) the required fee; and

(7) proof of new or continuing financial security as prescribed under §77.40.

(d) Falsification of information on an application is cause for denial and/or revocation of the registration.

(e) The Department may refuse to renew a registration if the applicant or a controlling person of the applicant has violated Texas Occupation Code, Chapter 1304, this chapter, or a rule or an order issued by the Commission or Executive Director.

(f) A person shall not perform work requiring registration under Texas Occupations Code, Chapter 1304 or this chapter with an expired registration.

§77.22. Registration Requirements--Administrator.

(a) No person may operate as an administrator for a provider or offer to act as an administrator for a provider operating in this state without first registering with the Department.

(b) A registration is valid for one year from the date issued.

(c) Initial applications for registration must provide the Department with all of the following required information, on forms prescribed by the Executive Director:

(1) a completed registration form;

(2) the name and Department registration number for each service contract provider(s) for which the person will act as an administrator;

(3) a list of the administrator's controlling persons as defined in Texas Occupations Code §1304.0035; and

(4) the required fee.

(d) Falsification of information on an application is cause for denial and/or revocation of the registration.

(e) The Department may refuse to issue a registration if the applicant or a controlling person of the applicant has violated Texas Occupation Code, Chapter 1304, this chapter, or a rule or an order issued by the Commission or Executive Director.

§77.23. Registration Renewal Requirements--Administrator.

(a) In order for an administrator to continue operating in this state, a registration must be renewed annually.

(b) Non-receipt of a registration renewal notice from the Department does not exempt a person from any requirements of this chapter.

(c) Renewal applications for registration must provide the Department with all of the following required information, on forms prescribed by the Executive Director:

(1) a completed registration form;

(2) the name and Department registration number for each service contract provider(s) for which the person will act as an administrator;

(3) a list of the administrator's controlling persons as defined in Texas Occupations Code §1304.0035; and

(4) the required fee.

(d) Falsification of information on an application is cause for denial and/or revocation of the registration.

(e) The Department may refuse to renew a registration if the applicant or a controlling person of the applicant has violated Texas Occupation Code, Chapter 1304, this chapter, or a rule or an order issued by the Commission or Executive Director.

(f) A person shall not perform work requiring registration under Texas Occupations Code, Chapter 1304 or this chapter with an expired registration.

§77.40. Financial Security--General Requirements.

(a) A provider must maintain financial security to ensure the faithful performance of a provider's obligations to its service contract

holders and for the benefit of those service contract holders who suffer actual financial loss due to the provider's failure to perform those obligations.

(b) A provider must submit proof of one of the following three forms of financial security that meets the requirements of Texas Occupations Code §1304.151 and/or §1304.152:

(1) a reimbursement insurance policy;

(2) a funded reserve account and a security deposit; or

(3) net worth of at least $100 million.

(c) All forms of financial security must be maintained by the provider for the entire time the provider continues to do business in this state or is registered to do business in this state.

(d) All forms of financial security must be kept in effect until the later of:

(1) two years after the provider ceases to do business in this state;

(2) two years after the provider's registration expires; or

(3) the Executive Director receives satisfactory proof from the provider and determines that the provider has discharged or otherwise adequately met all obligations to its service contract holders in this state.

(e) If any form of financial security is canceled or lapses during the term of the provider's registration, the provider may not issue a new service contract after the effective date of the cancellation or lapse, unless and until the provider files with the Executive Director a copy of a new form of financial security that meets the financial security requirements provided by Texas Occupations Code, Chapter 1304 and this chapter and that provides coverage after that date.

(f) Cancellation or lapse of the financial security does not affect the provider's liability for a service contract issued by the provider before or after the effective date of the cancellation or lapse.

§77.41. Financial Security--Reimbursement Insurance Policy.

(a) A provider that uses a reimbursement insurance policy to comply with the financial security requirements of Texas Occupations Code §1304.151 and §1304.152, will not be allowed to obtain or renew a registration unless the insurer issuing the policy has provided all of the information and met all of the requirements set forth in Texas Occupations Code §1304.152(a-1).

(b) A reimbursement insurance policy that is used to comply with the financial security requirements of Texas Occupations Code §1304.151 and §1304.152 must include:

(1) the "Service Contract Provider Texas Endorsement" prescribed by the Executive Director, or equivalent language; and

(2) copy of the approval letter from the Texas Department of Insurance for using the endorsement.

(c) If a reimbursement insurance policy, which is used to comply with the financial security requirements of Texas Occupations Code §1304.151 and §1304.152, is issued by a risk retention group, the provider must disclose to the Department:

(1) the identity of all of the policyholders/investors in the risk retention group; and

(2) the percentage of ownership of each policyholder/investor.

§77.42. Financial Security--Funded Reserve Account and Security Deposit.

(a) A provider that uses a funded reserve account and security deposit to comply with the financial security requirements of Texas Occupations Code §1304.151, will not be allowed to obtain or renew a registration unless the provider:

(1) maintains the funded reserve account and the security deposit at or above the financial levels required under §1304.151(b); and

(2) meets the requirements under this section.

(b) The funded reserve account maintained by the provider must:

(1) be kept separate from the provider's operating accounts; and

(2) not be used for any purpose other than to cover the provider's obligations under its service contracts that are issued and outstanding in this state.

(c) In addition to maintaining the funded reserve account, the provider must submit one of the following forms of security deposit:

(1) A surety bond that:

(A) is issued by a surety company authorized to do business in the State of Texas;

(B) conforms to the Texas Insurance Code;

(C) is on a Department-approved form;

(D) is payable to the Executive Director for the satisfaction of eligible service contract holder claims; and

(E) states that the surety company will provide the Department 60 days prior written notice of its intent to cancel the bond;

(2) A certificate of deposit that is assigned to the Executive Director;

(3) Securities of the type eligible for deposit by an authorized insurer in Texas;

(4) A deposit of cash or cash equivalents; or

(5) An original letter of credit that:

(A) is irrevocable;

(B) is issued by a qualified financial institution which is financially responsible in the amount of the letter of credit;

(C) does not require examination of the performance of the underlying transaction between the Department and the provider;

(D) is payable to the Department on demand or within a reasonably brief period of time after presentation of all required documents; and

(E) does not include any condition that makes payment to the Department contingent upon the consent of or other action by the provider or other party.

§77.43. Financial Security--Minimum Net Worth.

A provider that maintains, or has a parent company maintain, a net worth or stockholder's equity of at least $100 million to comply with the financial security requirements of Texas Occupations Code §1304.151, will not be allowed to obtain or renew a registration unless the provider gives the Department audited financial statements as described under §1304.151(c) and (d) or information for accessing and viewing the proof of net worth online.

§77.70. Responsibilities of Registrant--Provider and Administrator.

(a) The provider must clearly and conspicuously identify itself on all written service contracts and advertising materials that are used by the provider, its administrator(s), or its seller(s).

(b) The provider and/or any administrator appointed by the provider must provide service contract holders with a notification that meets all of the following requirements.

(1) The notification must provide the name, mailing address, and telephone number of the Department.

(2) The notification must contain a statement that unresolved complaints concerning a registrant or questions concerning the regulation of service contract providers and administrators may be addressed to the Department.

(3) The notification must be included on all written service contacts. The notification may be stamped on the contract or printed on a separate sheet and stapled to the contract.

(c) The provider and/or any administrator appointed by the provider must provide service contract holders with the provider's complaint resolution procedures.

(d) The provider and/or any administrator appointed by the provider must disclose the following information to service contract holders:

(1) the procedures and timeframes for returning a service contract in accordance with Texas Occupations Code §1304.157;

(2) the procedures and timeframes for voiding a service contract in accordance with Texas Occupations Code §1304.158;

(3) the procedures and timeframes for refunding the purchase price of the service contract to the service contract holder in accordance with Texas Occupations Code §1304.158; and

(4) the conditions in which the provider and/or administrator may cancel a service contract in accordance with Texas Occupations Code §1304.159.

(e) The provider and/or any administrator appointed by the provider must provide a copy of the service contract to the service contract holder within 45 days from the date of purchase.

(f) The provider and/or any administrator appointed by the provider must provide a receipt for or other written evidence of the purchase of a service contract to the service contract holder within 45 days from the date of purchase.

(g) The provider is responsible for the activities of the service contract sellers used to sell the provider's service contracts.

(h) A provider shall report to the Department within 30 days any change in information required by §77.20 and §77.21.

(i) An administrator shall report to the Department within 30 days any change in information required by §77.22 and §77.23.

(j) Upon notification by the Department, the provider and/or any administrator appointed by the provider shall allow the Department to audit records required to be maintained by Texas Occupations Code, Chapter 1304. These records include copies of the service contracts marketed, sold, administered or issued in this state.

(k) A provider must notify the Department no later than 60 days prior to the provider ceasing operations in this state or not renewing its registration in this state. A provider must notify the Department as soon as possible after the provider files for bankruptcy or is placed into receivership and must provide the contact information for the bankruptcy trustee or receiver and the court handling these proceedings.

(l) Within 10 days after notifying the Department in accordance with subsection (k), a provider must submit to the Department:

(1) the name(s) and the number of the active service contracts affected;

(2) the names and addresses of the service contract holders with active service contracts in this state and the remaining amount of time left on these active service contracts; and

(3) any other information determined necessary by the Department relating to the provider ceasing operations and/or terminating registration in this state.

(m) A provider must notify service contract holders with active service contracts in this state no later than 30 days prior to the provider ceasing operations in this state or not renewing its registration in this state. The provider remains financially responsible to service contract holders with active service contracts in this state.

§77.80. Fees.

(a) All registration fees are non-refundable.

(b) The initial registration fee for a service contract provider is $250.

(c) The annual renewal registration fee for a service contract provider is:

(1) $250 for registrants providing 0 to 250 service contracts;

(2) $500 for registrants providing 251 to 499 service contracts; and

(3) $1,000 for registrants providing 500 or more service contracts.

(d) The initial registration fee for an administrator is $250.

(e) The annual renewal registration fee for an administrator is $250.

(f) The fee for a duplicate or amended registration certificate is $25.

(g) Late renewal fees for registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

§77.90. Administrative Penalties and Sanctions.

If a person violates any provision of Texas Occupations Code, Chapter 1304, this chapter, or any rule or order of the Executive Director or Commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both in accordance with the provisions of Texas Occupations Code, Chapter 1304; Texas Occupations Code, Chapter 51; and any associated rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902851
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 463-7348

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.301

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.301 (General Definitions). The purpose of the proposed amendments is to change the general definitions of the lottery game rules so that they may conform to the requirements of new §401.317 for terminal printed instant games which is being proposed simultaneously with this amendment.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be a positive fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments, in conjunction with new §401.317, would be in effect, the public benefit anticipated from the adoption of the proposed amendments and new rule is additional revenue to the state and an opportunity for a wider variety of lottery game features for players.

The Commission requests comments on the amendments from any interested person. Comments on the proposed amendments may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 2:00 p.m. on Wednesday, August 5, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under the authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.301. General Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (19) (No change.)

~~[(20) Instant game--An instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the latex covered play area on an instant ticket to reveal the ticket play symbols.]~~

(20) [~~(21)~~] Instant retailer--A commission retailer authorized by the commission to sell instant scratch-off game tickets only.

(21) Instant scratch-off game--An instant scratch-off lottery game, developed and offered for sale to the public in accordance with commission rules that is played by removing the latex covered play area on an instant scratch-off ticket to reveal the ticket play symbols. Instant scratch-off games and instant scratch-off game tickets may be referred to in these rules as scratch-off games or scratch-off tickets.

(22) - (26) (No change.)

(27) On-line--All references to "on-line game", "on-line retailer", "on-line system", or "on-line terminal", may apply to terminal printed instant games when the context requires and is consistent with the definition of a terminal printed instant game, and is not in conflict with a rule specific to terminal printed instant games.

(28) [~~(27)~~] On-line game--A lottery game which utilizes a computer system to administer plays, the type of game, and amount of play for a specified drawing date, and in which a player either selects a combination of numbers or allows number selection by a random number generator operated by the computer, referred to as Quick Pick. The commission will conduct a drawing to determine the winning combination(s) in accordance with the rules of the specific game being played and the drawing procedures for the specific game. The definition of "on-line game" does not include the product defined in this rule as "terminal printed instant game" even though the terminal printed instant game may be sold with, and the results produced in conjunction with, an on-line game product.

(29) [~~(28)~~] On-line retailer--A lottery retailer authorized by the commission to sell on-line tickets and terminal printed instant game tickets. On-line retailers shall sell all on-line lottery games, terminal printed instant games, and at least two instant scratch-off [~~instant ticket~~] games offered by the commission.

(30) [~~(29)~~] On-line system--The commission or commission's vendor's on-line computer system consisting of on-line terminals, central processing equipment, and a communication network.

(31) [~~(30)~~] On-line terminal--The commission or commission's vendor's computer hardware through which an on-line retailer enters player selections, [~~or~~] Quick Pick selections, or terminal printed instant game selections and by which on-line tickets, or terminal printed instant game tickets are generated and claims are validated.

(32) [~~(31)~~] On-line ticket--A computer-generated ticket issued to a player, by an on-line retailer, as a receipt for the combination of numbers a player has selected, and generated on an on-line terminal provided by the commission or commission's vendor on official Texas Lottery paper stock, by either selecting his or her own numbers or selecting Quick Pick, which is a random number generator operated by the computer. That ticket shall be the only acceptable evidence of the combination of digits, numbers, or symbols selected. On-line tickets may be purchased only from on-line retailers.

(33) [~~(32)~~] Pack number--The unique number on the back of the instant scratch-off game ticket that designates the number of the pack within a specific instant scratch-off game.

(34) [~~(33)~~] Play area--The latex-covered area of an instant scratch-off game ticket that when removed, reveals the ticket play symbols.

(35) [~~(34)~~] Playstyle--The method of play to determine a winner for an individual game.

(36) [~~(35)~~] Play symbol--The printed data under the latex on the front of an instant scratch-off game ticket that is used to determine eligibility for a prize. The symbols for individual games will be specified in individual instant scratch-off game procedures.

(37) [~~(36)~~] Preliminary drawing--An event in which entries received by a specific deadline are utilized for the selection of contestants for a promotional drawing.

(38) [~~(37)~~] Present at the terminal--A player remains physically present at the on-line terminal from the time the player's order for the purchase of on-line lottery tickets is paid for and accepted by the lottery on-line retailer until the processing of the order is completed and the tickets are delivered to the player at the licensed on-line retailer terminal location.

(39) [~~(38)~~] Prize amounts for on-line games--The amount of money payable to each share in a prize category, the annuitized future value of each share in a prize category, or the net present cash value of each share in a prize category for each on-line game drawing. Prize amounts are calculated by dividing the prize category contribution, the annuitized future value of the prize category contribution, or the net present cash value of the prize category contribution by the number of shares determined for the prize category.

(40) Prize amounts for terminal printed instant game--The amount of money payable will be according to the predetermined prize structure stored in the lottery operator's gaming system and displayed on the terminal printed instant game ticket provided to the player.

(41) [~~(39)~~] Prize breakage--The money which is left over from the rounding down of the pari-mutuel prize levels to the next lowest whole dollar amount or money which is in excess of the amount needed to pay a prize.

(42) [~~(40)~~] Prize category--The matching combinations of numbers and their corresponding prize levels as described in rules for the specific game being played.

(43) [~~(41)~~] Prize category contributions--Refers to contributions for each drawing to each prize category including direct and indirect prize category contributions.

(44) [~~(42)~~] Prize fund--The monies allocated to be returned to players in winning tickets within a specific instant scratch-off or terminal printed instant game.

(45) [~~(43)~~] Prize pool--The total amount of money available for prizes as a percentage of the total sales for the current draw period.

(46) [~~(44)~~] Prize structure--The number, value, prize pay out percentage, and odds of winning prizes for an individual game as approved by the executive director.

(47) [~~(45)~~] Promotion--An event coordinated or conducted by the Texas Lottery Commission at retail sites, fairs, festivals and appropriate venues to educate players about Lottery products and/or sell Lottery games through a licensed Lottery retailer in specific markets to maximize Lottery sales and statewide awareness.

(48) [~~(46)~~] Promotional drawing--A drawing in which qualified contestants are awarded prizes in a random manner in accordance with the procedures set forth for a specific promotional event.

(49) [~~(47)~~] Quick Pick--A play option that generates random numbers by the computer.

(50) [~~(48)~~] Roll-over--The amount in a specific prize pool category resulting from no matching combinations and/or prize breakage from the previous drawing.

(51) [~~(49)~~] Sales agent--A person licensed under the State Lottery Act to sell tickets.

(52) [~~(50)~~] Shares--The total number of matching combinations within each prize category as determined for each drawing.

(53) [~~(51)~~] Sign-on slip--The receipt produced by the on-line terminal when the retailer signs on to the system.

(54) Terminal printed instant game--A terminal printed instant game, developed and offered for sale to the public in accordance with commission rules, and may be played in conjunction with a then existing online lottery product or as a stand-alone game, and is only available through a clerk assisted terminal. (The terminal printed instant game operates consistent with the instant scratch-off games, the main difference being terminal printed instant games reside in a game file maintained on the lottery operator's gaming system. Instead of being pre-produced for sale in paper form ("scratch-off"), the winning and non-winning plays are randomly and fairly distributed in a game file maintained on the lottery operator's gaming system in the same way as instant scratch-off ticket games. The winning and non-winning tickets are printed and distributed on demand from the gaming system in sequence, as game tickets are sold by licensed on-line retailers. The numbers and/or symbols appearing on the terminal printed instant game tickets are generated only as representations of the pre-determined win or non-win status of the sequential ticket purchased. There is no contemporaneous computation of a win/non-win status with the purchase of a ticket associated with the game.)

(55) Terminal printed instant game ticket--A terminal printed instant game ticket issued to a player, by an on-line retailer, as a receipt for the order and payment for a terminal printed instant game purchase. A terminal printed instant game ticket is generated on an on-line terminal provided by the commission or commission's vendor on official Texas Lottery paper stock. That ticket shall be the only acceptable evidence of a winning determination of a terminal printed instant game.

(56) [~~(52)~~] Texas Lottery Commission--The agency created by House Bill 54, 72nd Legislature, First Called Session, as amended by House Bill 1587 and House Bill 1013, 73rd Legislature, Regular Session.

(57) [~~(53)~~] Ticket--Any tangible evidence issued by the commission to allow participation in a game or activity authorized by the State Lottery Act.

(58) [~~(54)~~] Ticket number--The number on the back of the instant scratch-off ticket that refers to the ticket sequence within a specific pack of an instant scratch-off game.

(59) [~~(55)~~] Ticket bearer--The person who has signed the Lottery game ticket or who has possession of an unsigned Lottery game ticket.

(60) [~~(56)~~] Validation number--The unique number sequence printed on a ticket that provides for the verification of the ticket as a valid winner.

(61) [~~(57)~~] Valid ticket--A ticket which meets all specifications and validation requirements and entitles the holder to a specific prize amount.

(62) [~~(58)~~] Void ticket--Any ticket that is stolen, unissued, illegible, mutilated, altered, counterfeit in whole or part, misregistered, defective, incomplete, printed or produced in error, multiply printed, fails any of the commission's confidential validation tests, or is a ticket produced by or for the commission for education and training purposes.

(63) [~~(59)~~] Winning combination--One or more digits, numbers, or symbols randomly selected by the commission in a drawing which has been certified.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902822
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 344-5113

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16 TAC §401.302

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.302 (Instant Game Rules). The purpose of the amendments is to add a definitional preamble to §401.302 necessitated by amendments to §401.301.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be a positive fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed amendments would be in effect, the public benefit anticipated from the adoption of the proposed amendments, in conjunction with the adoption of the amendments to §401.301, is additional revenue to the state and an opportunity for a wider variety of lottery game features for players.

The Commission requests comments on the amendments from any interested person. Comments on the proposed amendments may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 2:00 p.m. on Wednesday, August 5, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The amendments are proposed under authority of Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The amendments are also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.302. Instant Scratch-off Game Rules.

(a) In this section, any reference to "instant game" shall mean "instant scratch-off game" as defined in §401.301 of this title (relating to General Definitions).

(b) [~~(a)~~] Sale of instant game tickets.

(1) Only retailers who have been licensed by the commission are authorized to sell instant game tickets, and tickets may be sold only at a licensed location.

(2) Each instant game ticket shall sell for the retail sales price authorized by the executive director and stated in the individual game procedures.

(3) Each instant game ticket shall state the overall estimated odds of winning a prize of any kind, including a break even prize.

(c) [~~(b)~~] Game procedures.

(1) The director of the marketing division may approve and publish individual game procedures prior to each instant game being introduced for sale to the public. Game procedures shall be published in the *Texas Register* and shall be made available upon request to the public.

(2) At a minimum, the game procedures for each game shall contain the following information:

(A) confirming captions;

(B) game name;

(C) game number;

(D) prize structure;

(E) playstyle;

(F) play symbols;

(G) ticket order quantity;

(H) retail sales price;

(I) dollar amount of prizes that may be paid by retailers; and

(J) eligibility requirements for a prize drawing, if any.

(3) The play style for an individual game shall be fully described in the game procedures and may take the form of one of the following methods of play:

(A) match up;

(B) add up;

(C) three in a line;

(D) key number/symbol match;

(E) yours beats theirs;

(F) prize legend;

(G) cards;

(H) bingo;

(I) directional arrows through maze;

(J) bonus game features; or

(K) any other approved play style or bonus game feature developed by the commission.

(d) [~~(c)~~] Determination of prize winner.

(1) The play symbols shall be used by a player to determine eligibility for instant prizes. Qualifying play symbols are stated in the game procedures.

(2) A player's eligibility to win a prize is subject to the ticket validation requirements provided in subsection (e) [~~(d)~~] of this section.

(3) For each individual game, the player shall rub off the latex covering on the front of the ticket to reveal the play symbols. Eligibility to win a prize is based on the approved play style as follows.

(A) Match up. If the designated number of identical play symbols is revealed on the ticket, the player shall win the prize indicated.

(B) Add up. If the player adds up all of the play symbols printed on the ticket and the amount is greater than or equal to the required total amount printed on the ticket, the player shall win the prize indicated.

(C) Three in a line. If the player reveals three identical play symbols, either diagonally, vertically, or horizontally, on the same ticket, the player shall win the prize indicated.

(D) Key number/symbol match. If the player reveals a play symbol that matches the designated key play symbol, the player shall win the prize indicated.

(E) Yours beats theirs. If the player reveals a play symbol designated as yours that is greater than the play symbol(s) designated as theirs, the player shall win the prize indicated.

(F) Prize legend. If the player reveals the designated number of play symbols, the player wins the prize amount that corresponds to the legend.

(G) Cards. If the player reveals the play symbol needed for that particular card game in a winning combination, the player shall win the prize indicated.

(H) Bingo. If the player matches their Bingo card numbers with all of the Caller's Card numbers and reveals certain patterns as specified on the ticket, the player shall win the prize indicated for that Bingo card and pattern.

(I) Directional arrows through maze. If the player follows the directional arrows to make a path or paths through a maze and the path(s) leads to a prize amount, the player shall win that prize.

(J) Bonus game features. These features are added to the game for extra play value and entertainment. The specific variants, as described below, are used for a particular game and are described in the individual game procedures:

(i) Doubler. If the player reveals the designated play symbol as part of the winning combination of the game, the player doubles their prize. The player may also reveal the "doubler" play symbol in a prize box, in which case the prize amount that the player won is doubled.

(ii) Wild card. The player may use this designated play symbol as part of the winning combination of the game.

(iii) Double and Double Doubler. If the player reveals one of these designated play symbols as part of the winning combination of the game, the player either doubles or quadruples their prize respectfully, as stated in the game card itself. The player may also reveal the "double" or "double doubler" play symbols in a prize box, in which case the prize amount that the player won is either doubled or quadrupled respectfully, as stated in the game card itself.

(iv) Tripler. If the player reveals the designated play symbol as part of the winning combination of the game, the player triples their prize. The player may also reveal the "tripler" play symbol in a prize box, in which case the prize amount that the player won is tripled.

(v) Auto win. If the player reveals the designated play symbol, the player wins the corresponding prize automatically.

(vi) Entry ticket. If the player reveals the designated play symbol, the player may use the ticket as a means of entering a drawing, subject to the game procedures for each game.

(K) Any other approved play style or bonus game feature developed by the Texas Lottery. If the player reveals the designated play symbols or bonus play features, the player shall win the prize(s) as indicated.

(e) [~~(d)~~] Ticket validation requirements.

(1) Each instant game ticket shall be validated according to validation procedures prior to payment of a prize.

(2) An instant game ticket shall comply with all of the following.

(A) The ticket shall not be stolen or appear on any list of omitted tickets on file with the commission.

(B) The ticket shall not be counterfeit or forged, in whole or in part.

(C) The ticket shall not be mutilated, altered, unreadable, reconstituted, or tampered with in any manner.

(D) The ticket shall have been issued by the commission in an authorized manner.

(E) The ticket shall have been received or recorded by the commission by applicable deadlines.

(F) The ticket shall pass all the confidential validation and security tests appropriate to the applicable playstyle.

(G) The validation number of an apparent winning ticket shall appear on the commission's official list of validation numbers of winning tickets for the particular game and pack. A ticket with that validation number shall not have been paid previously.

(3) The commission may pay the prize for a ticket that is partially mutilated or not intact if the ticket can still be verified as a valid ticket and validated by the other validation requirements and procedures.

(4) Any ticket not passing all of the validation tests and requirements is void and ineligible for any prize and shall not be paid. The executive director may, at his/her exclusive determination, reimburse the player for the cost of the void ticket.

(5) If a defective ticket is purchased and is void, the sole remedy available against the commission and the commission's sole liability shall be, at the executive director's sole discretion, reimbursement for the cost of the void ticket, or replacement of the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Game).

(f) [~~(e)~~] Payment of low-tier and mid-tier prizes.

(1) Low-tier and mid-tier prizes shall be paid by any retailer or claim center.

(2) Retailers may pay cash prizes in cash or by certified check, cashier's check, or money order. Retailers may also pay prizes by business check if acceptable to the claimant. If a retailer decides to

pay a prize with a business check, the retailer shall inform the claimant prior to ticket validation.

(3) Retailers may pay claims for prizes during their normal business hours, if the commission's validation system is operational.

(4) Before paying a prize, retailers shall validate the winning ticket according to established validation requirements and procedures.

(5) Payment of a prize by a retailer will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification, if appropriate.

(6) If a low or mid-tier claim is presented to the commission, the claimant shall follow all procedures of the commission related to claiming a prize, including but not limited to filling out a claim form, presenting appropriate identification if required, completing the back of the ticket, and submitting these items including the apparent winning ticket to the commission by mail or in person. Upon validation of a winning ticket, the commission shall present or mail a check to the claimant in payment of the amount due. If the ticket is determined to be a non-winning ticket, the claim shall be denied and the claimant shall be promptly notified. Tickets will not be returned to the claimant.

(g) [~~(f)~~] Payment of high-tier prizes.

(1) High-tier prizes must be presented for payment to the commission. For purposes of this provision, the term "commission" includes claim centers located throughout Texas. In connection with certain instant games, the top level prizes must be claimed at commission headquarters.

(2) If a high tier claim is presented to the commission, the claimant shall follow all procedures of the commission related to claiming a prize, including but not limited to filling out a claim form, presenting appropriate identification if required, completing the back of the ticket, and submitting these items including the apparent winning ticket to the commission by mail or in person. Upon validation of the ticket as a winning ticket, the commission shall pay the claimant the amount due in accordance with commission procedures. If the ticket is determined to be a non-winning ticket, the claim shall be denied and the claimant shall be promptly notified. Tickets will not be returned to the claimant.

(3) Before paying any prize, claim center personnel shall validate the winning ticket according to established validation requirements and procedures.

(4) All prizes shall be subject to tax withholding, offsets, and other withholdings as provided by law.

(5) If a person is indebted or owes delinquent taxes to the state, other than those specified in paragraph (4) of this subsection, the winnings of a person shall be withheld until the debt or taxes are paid.

(6) When paying a prize of $600 or more, the commission shall file the appropriate income reporting form with the Internal Revenue Service.

(7) Payment of a prize will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification.

(8) The director shall recognize only one person as claimant of a particular prize. A claim may be made in the name of a person other than an individual only if the person possesses a federal employer identification number (FEIN) issued by the Internal Revenue Service and such number is shown on the claim form. Groups, family units, clubs, organizations, or other persons without an FEIN shall designate one individual in whose name the claim is to be filed. If a claim is erroneously entered with multiple claimants, the claimants shall designate one of them as the individual recipient of the prize, or, if they fail to designate an individual recipient, the director may designate any one of the claimants as the sole recipient. In either case, the claim shall then be considered as if it were originally entered in the name of the designated individual and payment of any prizes won shall be made to that single individual. Once a ticket is validated, it will not be returned to the winner, but will be forwarded to the lottery, along with the completed claim form.

(9) The executive director has discretion to set a maximum total cash amount or maximum payment time period for each prize level.

(h) [~~(g)~~] Payment of prize awarded to minor.

(1) A person 18 years of age or older may purchase a ticket to give as a gift to another person, including a minor.

(2) If a minor is entitled to a cash prize of less than $600, the commission shall deliver to an adult member of the minor's family or to the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

(3) If a minor is entitled to a cash prize of more than $600, the commission shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

(4) If a minor is entitled to a prize other than money, the commission shall pay the cash equivalent of such prize in the manner provided by paragraphs (2) and (3) of this subsection.

(5) A retailer is not authorized to pay a prize claimed by a minor.

(i) [~~(h)~~] Ticket responsibility.

(1) A ticket is a bearer instrument until signed on the back by the ticket holder.

(2) The commission shall not be responsible for lost, stolen, or destroyed tickets.

(3) The commission shall not be responsible for erroneous or mutilated tickets.

(4) The commission shall not be responsible for tickets claimed by a player in error for a lower prize at a retailer.

(5) The commission shall not be responsible for tickets delivered to any address other than that designated by the commission for such purpose.

(j) [~~(i)~~] Disputed ticket. If a dispute arises between the commission and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the disputed ticket. This shall be the claimant's exclusive remedy.

(k) [~~(j)~~] Game closing.

(1) The executive director or his/her designee shall determine the closing date for an individual instant game in accordance with an instant game closing procedure that defines the criteria used to monitor Instant Ticket sales performance and that identifies when instant games should be closed.

(A) The procedure shall provide for the timely closing of an instant game after all top level prizes in the game have been claimed or on an earlier date as determined by the executive director.

(B) The procedure shall provide for ending ticket sales in an instant game within 45 days after game closing procedures have been initiated.

(2) No tickets in an instant game may be sold after the instant game closing date.

(l) [~~(k)~~] Governing law. In purchasing an instant game ticket, the lottery player agrees to comply with and abide by Texas law, all rules, procedures, and final decisions of the commission, and all procedures and instructions established by the executive director for the conduct of the instant game.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 9, 2009.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 344-5113

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16 TAC §401.317

The Texas Lottery Commission (Commission) proposes new 16 TAC §401.317 (Terminal Printed Instant Game Rule). The purpose of the proposed new rule is to authorize the conduct of terminal printed instant games. Terminal printed instant games are equivalent to an instant scratch-off game, the main difference being terminal printed instant games reside on the lottery operator's gaming system, the tickets of which are printed and dispensed on demand from the lottery operator's clerk assisted terminal by a licensed lottery retailer at a licensed location. Instead of being produced in the traditional instant scratch-off game paper form, the terminal printed instant game tickets are printed on official Texas Lottery paper stock. The winning and non-winning plays are randomly and fairly distributed in a game file maintained on the lottery operator's gaming system in the same way as instant scratch-off games. The winning and non-winning tickets are distributed from the gaming system in sequence, as game tickets are sold by clerks of licensed retailers. A terminal printed instant game may be played in conjunction with a then existing on-line lottery product or as a stand-alone game, and is only available through a clerk assisted terminal. There is no contemporaneous computation of a win/non-win status with the purchase of a ticket associated with the game. Terminal printed instant game tickets may only be sold only through a clerk assisted terminal by a licensed on-line retailer at a licensed location. Terminal printed instant game tickets may not be sold on self-service terminals. Terminal printed instant games are not played on a video lottery machine. The operation of any lottery game using a video lottery machine is prohibited.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be a positive fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of the Lottery Operations Division, has determined that for each year of the first five years the proposed new rule would be in effect, the public benefit anticipated from the adoption of the proposed new rule is additional revenue to the state and an opportunity for a wider variety of lottery game features for players.

The Commission requests comments on the new rule from any interested person. Comments on the proposed rule may be submitted to Pete Wassdorf, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 2:00 p.m. on Wednesday, August 5, 2009, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under Texas Government Code §466.015, which provides the Commission with the authority to adopt rules governing the operation of the lottery. The new rule is also proposed under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

§401.317. Terminal Printed Instant Game Rule.

(a) The executive director is authorized to conduct terminal printed instant games. The terminal printed instant games may have different names and game formats associated with the games. The executive director may issue further directives for the conduct of terminal printed instant games as necessary to implement this rule. The terms, conditions, and playing procedures of each terminal printed instant game will be published in the In Addition section of the *Texas Register.*

(b) Sale of terminal printed instant game tickets.

(1) Terminal printed instant game tickets may only be sold through a clerk assisted terminal by a licensed on-line retailer at a licensed location. (Terminal printed instant game tickets may not be sold on self-service terminals. Terminal printed instant games are not played on a video lottery terminal.)

(2) Each terminal printed instant game ticket shall sell for the retail sales price authorized by the executive director.

(3) Each terminal printed instant game ticket shall state the overall odds of winning a prize of any kind, including a break even prize.

(4) A terminal printed instant game may be played in conjunction with a then existing on-line lottery product (also referred to as the "underlying game").

(5) A terminal printed instant game may be an added option to more than one on-line game at a time. All rules of the underlying game shall take precedence over this rule for the underlying game.

(6) A terminal printed instant game may be played as a stand-alone game.

(7) Participation in a terminal printed instant game may be made by selection on a playslip or by request to the on-line retailer.

(8) When a terminal printed instant game play is purchased, an on-line retailer shall issue a terminal printed instant game ticket as evidence of each play.

(A) If purchased as an add-on to an underlying game, a separate ticket will be printed for each playboard purchased in the underlying on-line game along with the results for the terminal printed instant game. Each ticket will show the information necessary for the underlying game and be printed on official Texas Lottery paper stock. Each terminal printed instant game ticket will display the win/non-win status of the play.

(B) A player does not select numbers for a terminal printed instant game play that is associated with an underlying game. The winning and non-winning numbers are generated for the terminal printed instant game only as representations of the pre-determined win or non-win status, and prize amount of the next sequential purchase from a game file maintained on the lottery operator's gaming system.

(C) A player may select or request terminal printed instant game play for each playboard on a single playslip.

(D) Only one terminal printed instant game play per playboard may be purchased.

(E) Terminal printed instant game play is not available for future drawings of a multi-draw play. Only one terminal printed instant game ticket will be produced when multi-draw has been selected.

(F) When purchased as a stand-alone product, no selection of numbers or symbols is permitted by the player; any numbers or symbols required for representation of win/non-win status, or amount of prize will be generated by the gaming system on the terminal printed instant ticket. Each terminal printed ticket will display the win/non-win status of the play.

(9) Advance draw options are not available for a terminal printed instant game.

(10) The prize structure of each current terminal printed instant game available for sale will be published on the Texas Lottery Commission's web site and may also be obtained in a terminal report from a licensed sales agent.

(11) The executive director or his/her designee shall determine the closing date for an individual terminal printed instant game in accordance with a terminal printed instant game closing procedure that defines the criteria used to identify when the terminal printed instant game should be closed. The procedure shall provide for the timely closing of a terminal printed instant game after all top level prizes in the game have been claimed or on an earlier date as determined by the executive director. When a terminal printed instant game is closed, it may be immediately replaced by a new terminal printed instant game.

(12) When playing a terminal printed instant game, the win status will be determined in accordance with the play requirements published in the *Texas Register.* The play numbers or play symbols shall be used by the player to determine win status and win amount. The amount of winnings will be determined in accordance with the prize structure.

(13) Winning terminal printed instant game tickets may be claimed immediately after the ticket is purchased. When a winning terminal printed instant game ticket is issued in association with an underlying game and is claimed before the draw(s) for the underlying game, the winning terminal printed instant game ticket will be validated and an exchange ticket will be printed with the same selected or Quick Pick numbers as the original ticket for the underlying game. If the draw for the underlying game has already occurred, the ticket may be claimed for all wins represented by the ticket, whether terminal printed instant game or the underlying game, or both.

(14) Once a terminal printed instant game ticket has been issued, the ticket cannot be cancelled.

(15) Terminal printed instant game prizes must be redeemed within 180 days of the sale, if a stand-alone game, or within 180 days of the draw date of the underlying on-line game if purchased in association with an underlying game.

(c) Procedures for claiming terminal printed instant game prizes.

(1) All apparent winning tickets presented for payment to the lottery or an on-line retailer must meet the commission's validation requirements as set forth in subsection (d) of this section.

(2) To claim a terminal printed instant game prize of less than $600 claimant shall present the winning terminal printed instant ticket to an on-line retailer or to the commission. All tickets validated by a retailer must be paid by that retailer.

(3) If a claim of less than $600 is presented to an on-line retailer, the on-line retailer must validate the claim, and, if determined to be a winning ticket, make payment of the amount due the claimant.

(4) To claim a terminal printed instant game prize of $600 or more the claimant shall present the winning terminal printed instant ticket to the commission. For purposes of this provision, the term "commission" includes claim centers located throughout Texas. For any claim presented to the commission, the claimant shall follow all procedures of the commission related to claiming a prize, including but not limited to filling out a claim form, presenting appropriate identification if required, completing and submitting these items including the apparent winning ticket to the commission by mail or in person. Upon validation of the ticket as a winning ticket, the commission shall pay the claimant the amount due in accordance with commission procedures. If the ticket is determined to be a non-winning ticket, the claim shall be denied and the claimant shall be promptly notified. Tickets will not be returned to the claimant.

(5) Before paying any prize, claim center personnel shall validate the winning ticket according to established validation requirements and procedures.

(6) All prizes shall be subject to tax withholding and offsets and other withholdings as provided by law.

(7) If a person is indebted or owes delinquent taxes to the state, other than those specified in paragraph (6) of this subsection, the winnings of a person shall be offset or withheld until the debt or taxes are paid.

(8) When paying a prize of $600 or more, the commission shall file the appropriate income reporting form with the Internal Revenue Service.

(9) Payment of a prize will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification.

(10) The director shall recognize only one person as claimant of a particular prize. A claim may be made in the name of a person other than an individual only if the person possesses a federal employer identification number (FEIN) issued by the Internal Revenue Service and such number is shown on the claim form. Groups, family units, clubs, organizations, or other persons without an FEIN shall designate one individual in whose name the claim is to be filed. If a claim is erroneously entered with multiple claimants, the claimants shall designate one of them as the individual recipient of the prize,

or, if they fail to designate an individual recipient, the director may designate any one of the claimants as the sole recipient. In either case, the claim shall then be considered as if it were originally entered in the name of the designated individual and payment of any prizes won shall be made to that single individual. Once a ticket is validated, it will not be returned to the winner, but will be forwarded to the commission, along with the completed claim form.

(11) The executive director has discretion to set a maximum total cash amount or maximum payment time period for each prize level.

(d) Validation requirements.

(1) To be a valid winning terminal printed instant game ticket, all of the following conditions must be met.

(A) All printing on the ticket shall be present in its entirety, be legible, and correspond, using the computer validation file, to the combination and data printed on the ticket. For terminal printed instant games associated with an underlying on-line game, the terminal printed instant game ticket must have been produced prior to the drawing.

(B) The ticket shall not be mutilated, altered, unreadable, reconstituted, misregistered, defective, incomplete, or tampered with in any manner.

(C) The ticket shall not be counterfeit or forged, in whole or in part, or an exact duplicate of another winning ticket.

(D) The ticket must have been issued by an authorized on-line retailer in an authorized manner on official Texas Lottery paper stock.

(E) The ticket shall not be stolen.

(F) The ticket shall not have been previously paid.

(G) The ticket data must match the computer record data in every respect.

(H) The ticket shall pass all other confidential security checks of the commission.

(2) The commission may pay the prize for a ticket that is partially mutilated or not intact if the on-line ticket can still be validated by the other validation requirements.

(3) Liability for void tickets, if any, is limited to replacement of ticket or refund of sales price.

(4) A ticket shall be the only valid receipt for claiming a prize. A copy of a ticket or a playslip has no pecuniary or prize value and shall not constitute evidence of ticket purchase or of win status.

(5) In submitting an official terminal printed instant game ticket for validation, the player agrees to abide by applicable laws, all commission rules, regulations, policies, directives, instructions, conditions, procedures, and final decisions of the executive director.

(6) All prizes shall be subject to tax withholdings, offsets, and other withholdings as provided by law.

(e) Payment of prizes by on-line retailers.

(1) An on-line retailer may pay to the terminal printed instant game ticket bearer prizes of $599 or less for any valid claims presented to that on-line retailer. All tickets validated by a retailer must be paid by that retailer. These prizes may be paid during normal business hours of a retailer, provided the on-line system is operational and claims can be validated. The on-line retailer shall not charge the claimant any fee for payment of the prize or for cashing a business check drawn on the licensed retailer's account.

(2) Retailers may pay prizes in cash or by certified check, cashier's check, or money order. Retailers may also pay prizes by business check if acceptable to the claimant. If a retailer decides to pay a prize with a business check, the retailer shall inform the claimant prior to ticket validation. An on-line retailer that pays a prize with a check which is dishonored may be subject to suspension or revocation of its license.

(f) Payment of prize awarded to minor.

(1) A person 18 years of age or older may purchase a ticket to give as a gift to another person, including a minor.

(2) If a minor is entitled to a cash prize of less than $600, the commission shall deliver to an adult member of the minor's family or to the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

(3) If a minor is entitled to a cash prize of more than $600, the commission shall deposit the amount of the prize in a custodial account in a financial institution, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

(4) If a minor is entitled to a prize other than money, the commission shall pay the cash equivalent of such prize in the manner provided by paragraphs (2) and (3) of this subsection.

(5) A retailer is not authorized to pay a prize claimed by a minor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
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For further information, please call: (512) 344-5113

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

The Texas Department of Insurance proposes amendments to §7.202(b), concerning insurance holding company systems, and to §7.402, concerning risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs). Section 7.402 regulates risk-based capital and surplus requirements for (i) property and casualty insurers, (ii) life insurance companies, (iii) fraternal benefit societies, (iv) stipulated premium companies that do business in other states, (v) HMOs, and (vi) insurers filing the National Association of Insurance Commissioners (NAIC) Health Blank. These insurers and HMOs are referred to collectively as "carriers" in this proposal. The risk-based capital requirement is a method of ensuring that

a carrier has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of a carrier. The NAIC risk-based capital formulas provide the Department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations in consideration of its size and risk exposure.

Section 7.402(d) adopts by reference the NAIC risk-based capital formulas. The proposed amendments to §7.402(d) are necessary to adopt by reference the 2008 NAIC risk-based capital formulas to be used for year-end 2008. These formulas include (i) the 2008 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, (ii) the 2008 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, (iii) the 2008 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and (iv) the 2008 NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies. Copies of the documents proposed for adoption by reference are available for inspection in the office of the Texas Department of Insurance, Financial Analysis, William P. Hobby Jr. State Office Building, Tower Number III, Third Floor, MC 303-1A, 333 Guadalupe, Austin, Texas.

Chapter 823 of the Insurance Code regulates insurance holding company systems. Subchapter B, Chapter 7, of Title 28 of the Texas Administrative Code sets forth the administrative regulations for implementing the Insurance Code Chapter 823. Section 823.015 authorizes the Commissioner to exempt from the provisions of Chapter 823 of the Insurance Code and the administrative regulations in Subchapter B, except the registration requirement, any commercially domiciled insurer if the Commissioner determines that the insurer has assets physically located in this state or an asset to liability ratio sufficient to justify the conclusion that there is no reasonable danger that the operations or conduct of the business of the insurer could present a danger of loss to the policyholders of this state. Section 7.202(b) implements §823.015. Amendments are proposed to the title of Subchapter B and to §7.202(b) to make minor, nonsubstantive changes. These changes are necessary to (i) update references to the "Insurance Holding Company System Regulatory Act," the "Act," and Insurance Code references to be consistent with the nonsubstantive Insurance Code revision enacted in Acts 2001, 77th Legislature, Chapter 1419, §1, effective June 1, 2003; (ii) update obsolete Texas Administrative Code references; and (iii) correct the name of the Department's Financial Analysis Division. Specifically, the proposed amendments amend the title of Subchapter B by changing the word "System" to "Systems" and deleting the words "Regulatory Act." The proposed amendments to §7.202(b)(1) replace two statutory references to the "Act" with "the Insurance Code Chapter 823." The Insurance Holding Company System Regulatory Act, formerly Article 21.49-1 of the Insurance Code, was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §1, effective June 1, 2003. The Act was re-adopted as Chapter 823 in the same nonsubstantive Insurance Code revision. The proposed amendments to §7.202(b)(1) replace the statutory reference to the "Act, §2(s)" with "the Insurance Code §823.015." The Act, §2(s) was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §1, effective June 1, 2003. The Act, §2(s) was re-adopted as §823.015 in the same nonsubstantive Insurance Code revision. The proposed amendments to §7.202(b)(1)(B)(iii) add a reference to §7.402 (relating to Risk-Based Capital and Surplus Requirements for Insurers and HMOs) and remove the obsolete references to §7.401 and §7.410. The proposed amendment to §7.202(b)(2) replaces the statutory reference to "Article 21.49-2C" with "Chapter 827." Article 21.49-2C was repealed in the nonsubstantive Insurance Code revision, Acts 2001, 77th Legislature, Chapter 1419, §1, effective June 1, 2003. Article 21.49-2C was re-adopted as Chapter 827 in the same nonsubstantive Insurance Code revision.

Simultaneously with this proposal the Department is proposing the repeal of §7.401, concerning risk-based capital and surplus requirements for insurers and HMOs for year-end 2006, and §11.809, concerning risk-based capital for HMOs and insurers filing the NAIC health blank for year-end 2006. The repeal of §7.401 and §11.809 are necessary to delete the obsolete year-end 2006 risk-based capital requirements. The repeal of §11.809 is also necessary because the sole purpose of §11.809 is to direct all HMOs and insurers filing the NAIC Health Blank to comply with the requirements of §7.401. The proposed amendments to §7.402 address in a single section the risk-based capital requirements for all insurers and HMOs for year-end 2008. The repeal of §7.401 and §11.809 are also published in this issue of the *Texas Register.*

FISCAL NOTE. Mr. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for each year of the first five years the amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments. The proposal will have no effect on local employment or local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be that the Department will be able to more efficiently and effectively utilize existing resources in the review of the operations and financial condition of carriers, to more efficiently monitor solvency of the carriers subject to the proposal, and to implement the most current risk-based capital requirements. The proposed amendments will enable the Department to administer appropriate and proactive regulatory actions to protect the interests of the public against carriers whose financial condition may potentially be hazardous. The risk-based capital requirement is a method of ensuring that a carrier has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of a carrier. The NAIC risk-based capital formulas provide the Department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations considering its size and risk exposure.

The Department does not anticipate any additional potential cost to persons for compliance with the proposed amendments to §7.202(b). These proposed amendments do not impose any additional requirements on any regulated person. The proposed amendments are nonsubstantive and simply update obsolete Insurance Code references and Texas Administrative Code references and correct the name of the Department's Financial Analysis Division. The Department has determined that the proposed amendments to §7.402 contain three separate sets of requirements that must be analyzed in order to determine costs to carriers required to comply with the proposal. All of the requirements in the existing §7.402 continue to apply but the compliance with the requirements will be based on the use of the 2008 risk-based capital formulas. Therefore, while these requirements in the existing rule were adopted for risk-based capital and surplus re-

quirements for year-end 2007 using the 2007 risk-based capital formulas, the same requirements are also applicable to the risk-based capital and surplus requirements for year-end 2008 using the 2008 risk-based capital formulas. Therefore, the same types of costs that were incurred for year-end 2007 to comply with these requirements will also be incurred for year-end 2008. The Department believes that the cost of compliance with this proposal are the same as those costs for existing §7.402 that are currently in effect. This is because both the existing §7.402 and this proposal have the same three separate sets of requirements. Therefore, those estimated costs for these three separate sets of requirements, which are described below, are consistent with the year-end 2007 estimated compliance costs. The Department does not anticipate any new, incremental costs as a result of the proposed amendments.

As previously indicated, there are three separate sets of requirements resulting from these proposed amendments that must be analyzed in order to determine costs to small and micro business carriers required to comply with the proposed requirements. First, §7.402(b), (d) and (e) require, regardless of size, certain property and casualty insurers, certain life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank (the term carriers refers to all of these entities) to complete a risk-based capital report and reflect the results of that report in their financial statements filed with the Department. Section 7.402 does not apply to certain types of specified insurers and certain specified insurers with limited operations. Specifically, §7.402(b)(1) provides that §7.402 does not apply to any insurance company that writes or assumes a life insurance or annuity contract or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or any combination of these policies, in an amount that is $10,000 or less. Further, the scope indicated in §7.402(b)(1) does not include certain carriers regulated by the Department, such as a statewide mutual assessment association, a local mutual aid association, a mutual burial association, an exempt association, and a stipulated premium company only doing business in Texas. Second, certain carriers that have business subject to §7.402(d)(1) are also required to perform risk-based capital calculations pursuant to the 2008 life risk-based capital C-3 Phase II instructions. This requirement relates to certain unique types of business that is generally written only by large carriers. Third, regardless of size, carriers specified in §7.402(b) that fail to maintain capital and surplus in accordance with the specified levels in §7.402(g)(1), (2), (5) and (6) are required to prepare and implement a comprehensive financial plan under §7.402(g)(1), (2), (5) and (6).

§7.402(b), (d) and (e). Any carrier specified in §7.402(b) is required to comply with the requirements in §7.402(d) and (e) to prepare a risk-based capital report and reflect the results of the report in the carrier's financial statements filed with the Department. These costs will vary from carrier to carrier based on the size and type of the carrier, the character of its investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. Under the amendment, each carrier subject to proposed §7.402(b), (d) and (e), regardless of size, is required to acquire NAIC risk-based capital software at a cost of approximately $650 per entity for each carrier. The labor cost to transfer the information from a carrier's records to the applicable report will vary depending on the size of the carrier and the character of its investments; the transfer by larger carriers and carriers with more complex investments will generally take longer. If a carrier uses the annual statement software that conforms to NAIC specifications provided by authorized vendors to prepare its annual report, and if that software is linked to the risk-based capital formula software, the Department estimates that the information can be transferred and the formula completed in four hours or less. If the annual statement software is not linked to the risk-based capital formula, the Department estimates that a carrier will be able to transfer the information from its records to the risk-based formula in 8 to 16 hours. The Department's estimations are based upon discussions with industry representatives who are responsible for maintaining accounting records for carriers. It is anticipated that a carrier, regardless of size, will utilize an employee who is familiar with the accounting records of the carrier and accounting practices in general. The Department estimates that the compensation for this employee will range from approximately $20 to $40 an hour. After the completion of the transfer of information, the resulting risk-based capital report will likely be reviewed by an officer of the carrier who is responsible for the preparation of the financial reports of the carrier. The Department estimates that such officers are compensated at a range from approximately $40 per hour to approximately $100 per hour, or more. The Department also estimates that large carriers generally will compensate these officers at the higher end of the salary range. Therefore, based on the Department's experience, the cost of review of the risk-based capital report for small carriers will be less than the cost for large carriers.

The Department does not expect the 2008 risk-based capital formulas to require a level of capital that is significantly different from the capital requirements for 2007. Carriers have been required by the Department to comply with the risk-based capital requirements for several years. For those carriers previously subject to the risk-based capital requirements, the Department does not anticipate any material increase in cost resulting from a required capital contribution. However, the function of the risk-based capital formula is to protect policyholders from the effects of insolvency, which may require some carriers to increase their capital. To the extent any carrier must increase its capital as a result of the risk-based capital requirements, that cost is the amount of capital required and is a result of the statutory requirements in Insurance Code Chapter 404 and §§441.051, 822.210, 822.211, 841.205, 841.206, 843.404, and 884.206.

§7.402(d)(1). Carriers performing risk-based capital calculations pursuant to the 2008 life risk-based capital C-3 Phase II instructions required in §7.402(d)(1) will incur costs that vary by the size of the carriers and the amount and complexity of the business subject to these calculations. Less than 10 large domestic carriers and no small or micro business carriers in Texas are expected to have business subject to these calculations. A number of foreign carriers have business subject to these calculations as well. Business subject to these calculations is specified in the 2008 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies. It includes primarily variable annuity business, but also business that contains guarantees similar to those found in variable annuity business such as guaranteed minimum death benefits or guaranteed minimum living benefits. The C-3 Phase II calculations are considered a more appropriate measure of the capital requirement for the interest rate risks and market risks associated with this type of business, by requiring carriers to evaluate how various guarantees react to changes in equity markets and interest rates. The less than 10 large domestic carriers expected to be affected by

the 2008 life risk-based capital C-3 Phase II instructions will incur ongoing annual actuarial and computer personnel costs to perform the C-3 Phase II calculations. The Department estimates that these actuarial personnel costs will range from $25 per hour to approximately $300 per hour. Computer personnel costs are estimated to range from $25 per hour to approximately $150 per hour. The annual costs for each of these few large domestic carriers in Texas are estimated to range from one-half of one percent to one percent of the annual costs of administering each of the carrier's business affected by the C-3 Phase II requirements. The Department anticipates that such annual costs per carrier are believed to be similar for each foreign carrier in Texas with business subject to these requirements. The Department's estimations are based upon discussions with industry representatives familiar with resources and costs needed for these computations. Discussions with industry representatives involved several of the large domestic carriers in Texas estimated to have over half of the domestic carrier variable annuity business in Texas as measured on the basis of accumulation value for this business.

§7.402(g)(1), (2), (5), and (6). A few carriers (estimated to be less than one percent of the total carriers doing business in Texas) may need to prepare and file additional reporting with the Department at the company action level, as provided in §7.402(g)(1), (2), (5) and (6). The costs of this reporting will vary by company size and complexity but will generally involve an employee who is familiar with the accounting records of the carrier and is compensated at an estimated rate from $20 to $40 per hour. Assistance from actuarial staff may be required, and actuarial personnel costs is estimated to range from $25 per hour to approximately $300 per hour. The additional reporting requirements typically will involve the chief financial officer or other similar officer responsible for preparing the financial reports; such officers are generally compensated at hourly rates that may range from $40 per hour to approximately $300 per hour. The Department also estimates that large carriers generally will compensate these officers at the higher end of the salary range. Therefore, based on the Department's experience, the costs of preparation and filing of the additional reporting to the Department at the company action level are estimated to be relatively less for small and micro business carriers compared to large business carriers. Company action level reporting and its associated costs are intended to stave off other, higher costs that impacted carriers will likely incur absent their timely action to address the underlying concerns. Company action level reporting enables the Department to administer appropriate and proactive regulatory actions in order to protect the interests of the public against carriers whose financial condition may potentially be hazardous.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amendments to §7.202(b) will not have an adverse economic effect on small or micro businesses. As explained in the Cost Note part of this proposal, the proposed amendments do not impose any new requirements or costs on any individuals or entities. The proposed amendments to §7.202(b) are nonsubstantive and simply update obsolete Insurance Code references and Texas Administrative Code references and correct the name of the Department's Financial Analysis Division. In accordance with the Government Code §2006.002(c), the Department has therefore determined that a regulatory flexibility analysis is not required because the proposed amendments to §7.202(b) will not have an adverse impact on small or micro businesses.

The Department has determined that the proposed amendments to §7.402 contain three separate sets of requirements that must be analyzed in order to determine costs to small and micro business carriers required to comply with this proposal. As previously stated in the Cost Note part of this proposal, all of the requirements in the existing §7.402 continue to apply, but the compliance with the requirements will be based on the use of the 2008 risk-based capital formulas. Therefore, while all of the requirements in the existing rule were adopted for risk-based capital and surplus requirements for year-end 2007, the same requirements are also applicable to the risk-based capital and surplus requirements for year-end 2008. Therefore, the same types of costs that were incurred by small and micro business carriers for year-end 2007 to comply with these requirements will also be incurred for year-end 2008. The Department does not anticipate any change in these estimated costs from those estimated for compliance with the year-end 2007 requirements. The Department also does not anticipate any difference in the economic impact on small and micro business carriers from that determined for compliance with the year-end 2007 requirements. Therefore, the Department's economic impact statement and regulatory flexibility analysis for compliance with the year-end 2008 requirements is consistent with the economic impact statement and regulatory flexibility analysis for the year-end 2007.

As previously indicated, there are three separate sets of requirements resulting from these proposed amendments that must be analyzed in order to determine costs to small and micro business carriers required to comply with this proposal. First, §7.402(b), (d), and (e) require, regardless of size, certain property and casualty insurers, certain life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank (the term carriers refers to all of these entities) to complete a risk-based capital report and reflect the results of that report in their financial statements filed with the Department. Separate and apart from any requirements of the Government Code §2006.002(c), §7.402(b)(1) excludes certain insurers from compliance with the §7.402 requirements. These insurers are more likely to be small or micro business carriers because of the insurers' types or methods of operation. Under §7.402(b)(1), the risk-based capital requirements in §7.402 do not apply to any insurance company that writes or assumes a life insurance or annuity contract or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or any combination of these policies, in an amount that is $10,000 or less. Further, under §7.402(b)(1), certain insurers are excluded entirely from compliance with the §7.402 requirements. These include statewide mutual assessment associations, local mutual aid associations, mutual burial associations, exempt associations, and stipulated premium companies only doing business in Texas. Second, §7.402(d) and (e) require carriers specified in §7.402(b), regardless of size, to maintain capital and surplus in accordance with the specified levels. The failure to do so triggers the requirement in §7.402(g) that the carrier prepare and implement a comprehensive financial plan. Third, certain carriers that have business subject to §7.402(d)(1) are required to perform risk-based capital calculations pursuant to the proposed 2008 life risk-based capital C-3 Phase II instructions. The C-3 Phase II requirement relates to certain unique types of business that are generally

written only by large carriers and will therefore, not have an adverse economic effect on small or micro businesses.

§7.402(b), (d), and (e). As required by the Government Code §2006.002(c), the Department has determined that approximately 50 to 100 of the carriers specified in §7.402(b) are small or micro-business carriers that will be required to comply with the requirements in §7.402(d) and (e) to prepare a risk-based capital report and reflect the results of the report in the carrier's financial statements filed with the Department. These small or micro business carriers will incur routine costs associated with completing the risk-based capital report and reflecting the results in their financial statements filed with the Department. Also, as required by the Government Code §2006.002(c), the Department has determined that these routine costs will not have an adverse economic effect on the approximately 50 to 100 small or micro business carriers. These routine costs of compliance will vary between large business carriers and small or micro-business carriers based upon the carrier's type and size and other factors, including the character of the carrier's investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. The Department's cost analysis and resulting estimated routine costs for carriers in the Public Benefit/Cost Note portion of this proposal are equally applicable to small and micro-businesses. As indicated in the Public Benefit/Cost Note analysis, these routine costs will be less for small or micro business carriers. This is primarily because small or micro business carriers will incur less labor costs in transferring information from their records to the risk-based capital reports due to their smaller and less complex investment portfolios than large business carriers. Also, small or micro business carriers may compensate officers who review risk-based capital reports at a lower salary than large business carriers.

Under the Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare in addition to an economic impact statement a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Because the Department has determined that the routine costs to comply with this amendment, i.e., completing the risk-based capital report and reflecting the results in the carrier's financial statements filed with the Department, will not have an adverse economic effect on small or micro businesses, the Department is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule.

§7.402(g)(1), (2), (5) and (6). As required by the Government Code §2006.002(c), the Department has determined that the costs to comply with §7.402(g)(1), (2), (5) and (6) may have an adverse economic effect on no more than one or two small or micro-business carriers. Such costs will only be incurred by these relatively few small or micro-business carriers because of the failure of the individual carrier to maintain capital and surplus in accordance with the levels required in §7.402(g)(1), (2), (5) and (6). This failure will trigger the requirement in §7.402(g)(1), (2), (5) and (6) that the carrier prepare and implement a comprehensive financial plan. This plan will be necessary to identify the conditions that contribute to the carrier's financial condition. The plan must contain proposals to correct areas of substantial regulatory concern and projections of the carrier's financial condition, both with and without the proposed corrections, including plans to restore its capital and surplus to acceptable levels. The total cost of compliance with §7.402(g)(1), (2), (5) and (6) for preparing and implementing comprehensive financial plans will depend on the size and type of the small or micro-business carrier and several other factors. These other factors include the character of the carrier's investments, the kinds and nature of the risks insured, the type of software used by the carrier to complete its annual statement, and employee compensation expenses. The Department's cost analysis and resulting estimated costs for carriers who will be required to prepare and implement a comprehensive financial plan in the Public Benefit/Cost Note portion of this proposal are equally applicable to small or micro-businesses. As indicated in the Public Benefit/Cost Note analysis, these costs will be less for small or micro-business carriers, primarily because small or micro business carriers will incur less labor costs in transferring information from their records to the risk-based capital reports due to their smaller and less complex investment portfolios than large business carriers and because small or micro business carriers may compensate officers that review risk-based capital reports at a lower salary than large business carriers. The function of the risk-based capital formulas in §7.402(d) is to protect policyholders, enrollees, and carriers from the effects of carrier insolvency. Therefore, carriers, regardless of size, that are required to submit comprehensive financial plans may also be required to increase their capital. To the extent any carrier must increase its capital as a result of the risk-based capital requirements, that cost is the amount of capital required and is a result of the statutory requirements in the Insurance Code Chapter 404 and §§441.051, 822.210, 822.211, 841.205, 841.206, 843.404, and 884.206. These statutes authorize or require the Commissioner to order carriers that are operating in a potentially hazardous manner to take action to remedy such hazardous condition, which may include the requirement that the carriers increase their capital and surplus and take other remedial action.

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though §7.402(g)(1), (2), (5) and (6) may have an adverse economic effect on small or micro-businesses that are required to comply with these proposed requirements, the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory flexibility analysis ". . . consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

Section 7.402(g)(1), (2), (5) and (6) are authorized by the following Insurance Code statutes: §§404.003 - 404.005, and §§822.210, 841.205, 843.404, and 884.206. The primary purpose of these statutes is to require a carrier to maintain capital and surplus in amounts that exceed the minimum amounts required by statute because of (i) the nature and kind of risks the carrier underwrites or reinsures; (ii) the premium volume of risks the carrier underwrites or reinsures; (iii) the composition,

quality, duration, or liquidity of the carrier's investments; (iv) fluctuations in the market value of securities the carrier holds; (v) or the adequacy of the carrier's reserves. These statutes further require that a rule adopted by the Commissioner be designed to ensure the financial solvency of a carrier for the protection of policyholders, enrollees, creditors, or the general public from the harmful effects of carrier insolvency. Section 441.001(g) provides that for the reasons stated in §441.001, the substance and procedures in Insurance Code Chapter 441 are the public policy of the State of Texas and are necessary to the public welfare. Section 441.001(a) states that insurer delinquencies destroy public confidence in the state's ability to regulate insurers and an insurer delinquency affects other insurers by creating a lack of public confidence in insurance and insurers. Section 441.001(b) states that placing an insurer in receivership often destroys or diminishes, or is likely to destroy or diminish, the value of the insurer's assets. Further, the purpose of Insurance Code §§441.051, 822.211, and 841.206 is to prohibit the impairment of a carrier's minimum required capital or surplus, and these statutes require that the Commissioner take action to remedy the impairment. Sections 441.051, 822.211, and 841.206 further provide that the failure of a carrier to maintain its required capital or surplus at levels required by the Commissioner by rule is considered a prohibited impairment.

The purpose of §7.402(g)(1), (2), (5) and (6) is to protect the economic welfare of (i) carriers, (ii) consumers that purchase insurance policies, annuities and other contracts issued by property and casualty insurers, life insurance companies, fraternal benefit societies, stipulated premium companies that do business in other states, HMOs, and insurers filing the NAIC Health blank, (iii) other persons and entities that would be adversely affected by a carrier insolvency against the risk that a carrier may become insolvent and unable to pay its insureds' claims and other obligations as they become due, and (iv) the public and the state of Texas generally.

The requirements in §7.402(g) that carriers maintain capital and surplus at acceptable levels or prepare a comprehensive financial plan to restore their capital and surplus to acceptable levels are consistent with and necessary to implement the legislative intent of §§404.003 - 404.005, and §§822.210, 841.205, 843.464, and 884.206 of the Insurance Code. This intent is to ensure the financial solvency of a carrier, regardless of size, for the protection of the economic interests of all policyholders and not just the economic interests of those policyholders insured by large carriers.

Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of §7.402(g)(1), (2), (5) and (6) and the authorizing statutes of the Insurance Code is to protect carrier and consumer economic interests and the state's economic welfare, there are no additional regulatory alternatives to the required comprehensive financial plans and increased capital required as a result of the risk-based capital requirements that will sufficiently protect the economic interests of carriers and consumers and the economic welfare of the state.

§7.402(d)(1). As required by the Government Code §2006.002(c), the Department has determined that §7.402(d)(1), relating to the 2008 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula, will not have an adverse economic effect on small or micro businesses. The Department does not anticipate that any small or micro business carriers will have business subject to §7.402(d)(1). Therefore no small or micro business will be required to perform risk-based capital calculations pursuant to the 2008 life risk-based capital C-3 Phase II instructions. The §7.402(d)(1) requirement relates to certain unique types of business that, based upon consultation with industry, is generally written only by large carriers.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 24, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER B. INSURANCE HOLDING COMPANY SYSTEMS

28 TAC §7.202

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code Chapters 404 and 441 and §§441.005, 441.051, 541.401, 822.210, 841.205, 884.206, 823.012, 843.404, 885.401, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Section 441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Section 541.401 authorizes the Commissioner to adopt reasonable rules necessary to accomplish the purposes of trade practices regulation in Chapter 541. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 823.012 authorizes the Commissioner to issue rules and orders necessary to implement the provisions of Chapter 823 of the Insurance Code (Insurance Holding Company Systems). Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of health maintenance organizations for the protection of enrollees. Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including

any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapters 404 and 441 and §§541.401, 822.210, 823.012, 841.205, 843.404, 885.401, 884.206, 982.105, and 982.106.

§7.202. Definitions.

(a) (No change.)

(b) Exemption--Commercially Domiciled Insurer.

(1) The commissioner may exempt from the provisions of the Insurance Code Chapter 823 [~~Act~~] and these sections, except the registration requirement, any commercially domiciled insurer if the commissioner determines that the insurer has assets physically located in this state or an asset to liability ratio sufficient to justify the conclusion that there is no reasonable danger that the operations or conduct of the business of the insurer could present a danger of loss to the policyholders of this state. The exemption granted under this subsection shall set forth the specific criteria under which it is granted and shall be subject to annual review. The commissioner may, after notice and opportunity for hearing, rescind an exemption granted to a commercially domiciled insurer under the provisions of the Insurance Code Chapter 823 [~~Act~~] and these sections. A rescission of an exemption shall set forth the rationale for the rescission. Requests for an exemption under this subsection shall be filed with the Financial Analysis Division [~~and Examinations~~], Mail Code 303-1A, Texas Department of Insurance, P.O. Box 149099, 333 Guadalupe, Austin, Texas 78714-9099. The request must contain a signed and notarized affidavit of an executive officer of the insurer that, should the exemption be granted, the insurer has agreed to notify the Financial Analysis Division [~~and Examinations~~] within ten days after it no longer meets the criteria set out in this section on which the exemption is based. In determining that a commercially domiciled insurer has sufficient assets to justify the conclusion that there is no reasonable danger that the operations or conduct of the business of the insurer could present a danger of loss to policyholders of this state, the commissioner shall give consideration to the matters contacted in subparagraphs (A) - (D) of this paragraph in connection with an exemption requested under the Insurance Code §823.015 [~~Act, §2(s)~~], and these sections.

(A) (No change.)

(B) Adequacy of policyholder surplus, based upon:

(i) - (ii) (No change.)

(iii) the insurer having capital and surplus equal to 250% of the minimum risk-based capital described in §7.402 [~~7.410 of this title (relating to Minimum Risk-Based Capital and Surplus Requirements for Stock Property/Casualty Insurers) or §7.401~~] of this chapter [~~title~~] (relating to [~~Minimum~~] Risk-Based Capital and Surplus Requirements for Insurers and HMOs [~~Life, Accident and Health Insurers~~]); or

(iv) (No change.)

(C) - (D) (No change.)

(2) The provisions of this subchapter shall not apply to a foreign or alien insurer if the commissioner has approved a total withdrawal plan from writing all lines of insurance for such insurer under the Insurance Code Chapter 827 [~~Article 21.49-2C~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902847
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS

28 TAC §7.402

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code Chapters 404 and 441 and §§441.005, 441.051, 541.401, 822.210, 841.205, 884.206, 823.012, 843.404, 885.401, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Section 441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Section 541.401 authorizes the Commissioner to adopt reasonable rules necessary to accomplish the purposes of trade practices regulation in Chapter 541. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 823.012 authorizes the Commissioner to issue rules and orders necessary to implement the provisions of Chapter 823 of the Insurance Code (Insurance Holding Company Systems). Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of health maintenance organizations for the protection of enrollees. Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements

for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapters 404 and 441 and §§541.401, 822.210, 823.012, 841.205, 843.404, 885.401, 884.206, 982.105, and 982.106.

§7.402. Risk-Based Capital and Surplus Requirements for Insurers and HMOs [~~Year-End~~ ~~2007~~].

(a) - (c) (No change.)

(d) Adoption of RBC formula by reference. The commissioner adopts by reference the following:

(1) The 2008 [~~2007~~] NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(2) The 2008 [~~2007~~] NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(3) The 2008 [~~2007~~] NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(4) The 2008 [~~2007~~] NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula.

(e) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902846
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 463-6327

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28 TAC §7.401

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Insurance proposes the repeal of §7.401, concerning the minimum risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs) for year-end 2006. The repeal is necessary because the due dates for filing the year-end 2006 risk-based capital reports and other filings required under the section have passed. Therefore, the need for this section no longer exists. Simultaneously with this repeal, the Department is proposing amendments to §7.202(b), concerning insurance holding company systems, and amendments to §7.402(d), concerning risk-based capital and surplus requirements for insurers and HMOs for year-end 2007. The proposed amendments to §7.402(d) are necessary to adopt by reference the 2008 NAIC risk-based capital formulas to be used for year-end 2008. The proposed amendments to §7.202(b)(1)(B)(iii) add a reference to §7.402 (relating to Risk-Based Capital and Surplus Requirements for Insurers and HMOs) and remove the obsolete references to §7.401 and §7.410. The proposed amendments to §7.202(b) and §7.402(d) are also published in this issue of the *Texas Register.*

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the repeal of the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal, and there will be no anticipated effect on local employment or local economy as result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that, for each year of the first five years the repeal of the section will be in effect, the public benefit anticipated as a result of the repeal will be the elimination of obsolete regulations. There will be no anticipated economic costs to any individuals, or insurers or other Department regulated entities, regardless of size, as a result of the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is simply a repeal of an obsolete rule. Therefore, in accordance with the Government Code §2006.002(c), the Department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 24, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, oral and written comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of the section is proposed under the Insurance Code Chapters 404 and 441 and §§441.051, 822.210, 841.205, 843.404, 884.206, 885.401, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies and in §441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or

capital stock is impaired to an extent prohibited by law. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of health maintenance organizations for the protection of enrollees. Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes in the Insurance Code will be affected by this proposed repeal: Chapters 404 and 441 and §§822.210, 841.205, 843.404, 885.401, 884.206, 982.105, and 982.106.

§7.401. Risk-Based Capital and Surplus Requirements for Year-End 2006.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902849
Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 463-6327

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CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

SUBCHAPTER I. FINANCIAL REQUIREMENTS

28 TAC §11.809

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Insurance proposes the repeal of §11.809, concerning the risk-based capital requirements for health maintenance organizations (HMOs) and insurers filing the National Association of Insurance Commissioners (NAIC) Health Blank for year-end 2006. The sole purpose of §11.809 is to direct all HMOs and insurers filing the NAIC Health Blank to comply with the requirements of §7.401. Section 7.401 specifies the risk-based capital and surplus requirements for all insurers and HMOs for year-end 2006. Simultaneously with the repeal of §11.809, the Department is proposing to repeal §7.401 and to amend §7.402 to prescribe the risk-based capital requirements for all insurers and HMOs for year-end 2008. Therefore, the need for §11.809 no longer exists. The proposed repeal of §7.401 and the proposed amendments to §7.402 are also published in this issue of the *Texas Register.*

FISCAL NOTE. Danny Saenz, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the repeal of the section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal. There is no anticipated effect on local employment or local economy as result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that, for each year of the first five years the repeal of the section will be in effect, the public benefit anticipated as a result of the repeal will be the elimination of obsolete regulations. There are no anticipated economic costs to any individuals, or insurers or other Department regulated entities, regardless of size, as a result of the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is simply the repeal of an obsolete rule. Therefore, in accordance with the Government Code §2006.002(c), the Department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 24, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Danny Saenz, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, oral and written comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of the section is proposed under the Insurance Code Chapters 404 and 441 and §§441.051, 822.210, 841.205, 843.404, 884.206, 982.105, 982.106, and 36.001. Chapters 404 and 441 address the duties of the Department when an insurer's solvency is impaired. Chapter 404 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies and

in §441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Sections 822.210, 841.205, and 884.206 authorize the Commissioner to adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of health maintenance organizations for the protection of enrollees. Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes in the Insurance Code will be affected by this proposed repeal: Chapters 404 and 441 and §§822.210, 841.205, 843.404, 884.206, 982.105, and 982.106.

§11.809. Risk-Based Capital for HMOs and Insurers Filing the NAIC Health Blank.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

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Brenda Caldwell
Assistant General Counsel
Texas Department of Insurance
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER J. PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND WATER QUALITY MANAGEMENT PLANS

30 TAC §39.551

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) proposes an amendment to §39.551.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking amends §39.551(c)(2) and adds §39.551(c)(2)(A) and (B) to state that if the notice of receipt of application and intent to obtain a permit (NORI) is mailed more than two years before the date that the notice of application and preliminary decision (NAPD) is scheduled to be mailed, then the applicant must prepare an updated landowner list and map, and file them with the commission. The proposed rule also allows the Executive Director to require an updated landowners map and mailing addresses for the NAPD for any water quality matter in which the Executive Director determines that circumstances have changed to warrant this new information. The commission is proposing this change to ensure that when the NAPD is mailed, it is mailed to the most current list of potentially affected persons.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 281, Applications Processing, and Chapter 295, Water Rights, Procedural.

This proposed rule will not apply to any applicant for a water quality permit if the NAPD has been mailed at the time that the rules become effective.

SECTION DISCUSSION

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors.

The proposed amendment to §39.551 requires applicants to supply an updated landowner map and mailing addresses to the chief clerk if it has been more than two years since the NORI was mailed to the landowner list. This requirement has been added to increase the accuracy of the mailing list for the NAPD if significant time has elapsed between the NORI and the NAPD. The updated list will allow new potentially affected landowners to participate in the permitting process who otherwise might not have been aware of the pending permit application. The original §39.551(c)(2) is divided into two subparagraphs. Subparagraph (A) contains the language in the original §39.551(c)(2). Subparagraph (B) contains the language of the proposed new requirement.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. The agency will need to develop a method to track the time elapsed between mailing a NORI and a NAPD when dealing with wastewater permit applications. The agency will also need to monitor receipt of updated landowner information and new mailing labels for new or changed addresses. These tasks will be accomplished using currently available agency resources. Other state agencies and local governments applying for new or amended wastewater permits will have to submit updated landowner maps and address labels to the agency if permit processing takes more than two years. Cost increases to provide such information are not expected to be significant.

The proposed rulemaking is part of corresponding rule proposals regarding when public notice is mailed or published that also

includes amendments to Chapters 281 and 295. The fiscal impacts of the proposed amendments to those chapters are detailed in separate fiscal notes.

The proposed amendment to Chapter 39 would state that if a NORI is mailed more than two years before the date that a NAPD is scheduled to be mailed, the wastewater permit applicant must provide and file with the commission an updated landowner list and landowner map. The proposed rules also allow the Executive Director to require this information under certain circumstances. Other minor administrative changes (updating agency references and cross-references, and correcting typographical, spelling, and grammatical errors) are also included in the proposed amendment to Chapter 39.

Using a salary rate provided from Chamber of Commerce data of $15 per hour for administrative and office support staff, the agency estimates that state agencies and local governments required to obtain and provide updated maps and address lists under the proposed amendment could see costs increase by $90 to $150 per wastewater permit application.

Of the estimated 1,400 governmental entities that may apply for wastewater permits, only a few will see a permit delay of two years or more. Of the 171 applications for new or amended permits for all regulated parties that were pending on April 1, 2009, staff estimates that approximately 12 would be required to submit updated maps and addresses.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be more accurate communication regarding wastewater permits by notifying the most current population potentially affected by a wastewater permit application. Some potentially affected parties may be newcomers to the population if more than two years elapse between the mailing of the NORI and the NAPD.

Businesses or individuals affected by the proposed amendment for notice requirements could see costs increase by $90 to $150 per wastewater permit application if they are required to obtain and provide updated maps and address lists. This cost increase is not expected to have a significant fiscal impact. Also, of the 171 applications for new or amended permits for all regulated parties pending on April 1, 2009, staff estimates that approximately 12 would be required to submit updated maps and addresses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No significant adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. If more than two years elapse between the mailing of the NORI and the NAPD, a small business that applies for a new or amended wastewater permit will be required to obtain and provide updated maps and address lists under the proposed rule. This could increase costs by approximately $90 to $150 per wastewater permit application. Staff does not anticipate that many small or micro-businesses will be affected by the proposed rule.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely impact a small or micro-business in a material way for the first five years that the proposed rule is in effect. Cost increases are expected to be small (approximately $90 to $150 per wastewater permit application), and only a small number of entities statewide are expected to experience any cost increase.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the proposed amendment and performed an analysis of whether the proposed amendment requires a regulatory impact analysis under Texas Government Code, §2001.0225. The proposed amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking is to require updated landowner lists and maps for NAPDs that are mailed more than two years after the NORI for water quality and to allow the Executive Director to require updated lists and maps for the NAPD for any water quality matter in which the Executive Director determines that circumstances have changed to warrant this new information. The small costs associated with these updated lists and maps would not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendment and performed an analysis of whether the proposed amendment constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendment is to provide for adequate notice to potentially affected persons for water quality permits. The proposed amendment would substantially advance this stated purpose by requiring applicants to update their landowner lists and maps if the NAPD is mailed more than two years after the NORI and allowing the Executive Director to require updated lists and maps for the NAPD for any water quality matter in which the Executive Director determines that circumstances have changed to warrant this new information. Promulgation and enforcement of the proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, this rulemaking is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

Written comments on the draft takings impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking with the Coastal Coordination Act may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 18, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Jessica Rawlings, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-028-295-LS. The comment period closes August 24, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Robin Smith, Environmental Law Division, (512) 239-0463; Sherry Smith, Water Quality Division, (512) 239-0571; or Ronald Ellis, Water Supply Division, (512) 239-1282.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also proposed under Texas Water Code, §5.553, which provides notice requirements for water quality permits; Texas Water Code, §26.028, which provides for commission action on a water quality permit application after notice; and Texas Water Code, §26.121, which provides that certain discharges of waste are prohibited unless authorized by the commission.

The proposed amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 5.553, 26.028, and 26.121.

§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

(b) Notice of receipt of application and intent to obtain permit.

(1) Notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1) - (9) and (12) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendments [~~Amendment~~]); or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(3) For permits listed in paragraph [~~subsection (b)~~](2)(C) of this subsection [~~section~~], the executive director will require the applicant to post a copy of the notice of receipt of application and intent to obtain a permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(c) Notice of application and preliminary decision. Notice under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title. In addition to §39.419 of this title, for all applications except applications to renew permits, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive

director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(A) For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(B) If the notice of the receipt of application and intent to obtain a permit was mailed more than two years prior to the time that notice of application and preliminary decision is scheduled by the executive director to be mailed, the applicant must submit an updated landowner map, landowner list, and any associated information for mailing the notice of application and preliminary decision. Notwithstanding this requirement, the Executive Director may require an updated landowner map, landowner list, and any associated information for mailing the notice of the application and preliminary decision if circumstances in the area have significantly changed that warrant updated lists.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(5) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new TPDES permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title [~~(relating to Amendment)~~]; or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(6) For permits listed in paragraph [~~subsection (c)~~](5)(C) of this subsection [~~section~~], the executive director will require the applicant to post a copy of the notice of application and preliminary decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(d) Notice of application and preliminary decision for certain TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply:

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title [~~(relating to Amendment)~~], the following mailed and published notice is required.

(A) The applicant shall publish notice of the application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (12), and (c)(2) - (6) of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (b) of this section.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, [~~Modifications,~~] Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists); and

(vii) any other person the executive director or chief clerk may elect to include.

(B) For TPDES major facility permits as designated by the United States Environmental Protection Agency [~~EPA~~] on an annual basis, notice shall be published in the *Texas Register.*

(C) The text shall meet the requirements in §39.411(b)(1) - (4)(A), (6), (7), (9), and (12), and (c)(4) - (6) of this title.

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Period [~~Processing~~]).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings [~~SOAH~~] for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.413 of this title [~~(relating to Mailed Notice)~~], except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the agency's library located at the commission's central office located at 12100 Park 35 Circle, Building A, Austin [~~of the agency, Park 35, 12015 North Interstate 35, Austin~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 10, 2009.

TRD-200902833
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 239-0177

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CHAPTER 281. APPLICATIONS PROCESSING SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.17

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) proposes an amendment to §281.17.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking amends §281.17(a) to provide that the executive director will file a water rights application with the chief clerk once the application has been declared administratively complete, but notice of the application will not be sent at that time. This change is necessary because of a corresponding rulemaking in which the commission is changing the time that notice of a water rights application is mailed from the time that the application is declared administratively complete to the time that the technical review is complete and the memoranda and recommendations are filed with the chief clerk. This change to §281.17 is necessary because the issuance of the notice is being moved to later in the process, and also because the application must still be declared administratively complete and filed with the chief clerk. This is particularly important because that date is usually the priority date for a water rights permit, if issued.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice, and Chapter 295, Water Rights, Procedural.

SECTION DISCUSSION

The commission proposes administrative changes throughout the proposed rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors.

The proposed amendment to §281.17(a) removes the requirements that the executive director prepare a technical summary of a water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(a) consistent with proposed changes to §295.151 and §295.158. The proposed amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The proposed amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

The proposed amendment to §281.17(b) removes the requirements that the executive director prepare a technical summary of a temporary water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(b) consistent with proposed changes to §295.151 and §295.158. The proposed amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The proposed amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule.

The proposed amendment to Chapter 281 is part of corresponding rule proposals regarding when public notice is mailed or published that also includes amendments to Chapters 39 and 295. The fiscal impacts of the proposed amendments to those chapters are detailed in separate fiscal notes.

The amendment to Chapter 281 is proposed to ensure consistency with the rule changes proposed for Chapter 295 concerning the time that notice of a water rights application is mailed or published. Administrative changes to Chapter 281, including updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors, are also proposed.

The proposed rule will amend §281.17(a) and (b) concerning technical summaries for water use permit applications and temporary water use permit applications to make this section compatible with proposed changes to Chapter 295 concerning the timing of public notice. This rulemaking does not change the content and substance requirements of public notice, and there are no fiscal impacts to local governments associated with this rulemaking.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be consistency with the proposed changes for Chapter 295.

The proposed rule will amend §281.17(a) and (b) concerning technical summaries for water use permit applications and temporary water use permit applications to make this section compatible with proposed changes to Chapter 295 concerning the timing of public notice. This rulemaking does not change the content and substance requirements of public notice, and there are no fiscal impacts to businesses associated with this rulemaking.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. The proposed rule will amend §281.17(a) and (b) concerning technical summaries for water use permit applications and temporary water use permit applications to make this section compatible with proposed changes to Chapter 295 concerning the timing of public notice. This rulemaking does not change the content and substance requirements of public notice, and there are no fiscal impacts to small or micro-businesses associated with this rulemaking.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule requires a regulatory impact analysis under Texas Government Code, §2001.0225. The proposed amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure and it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The purpose of this rulemaking together with a corresponding rulemaking in Chapter 295 is to change the date of notice for a water rights application from the date the application is administratively complete to the date of the completion of technical review. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendment together with a corresponding rulemaking in Chapter 295 is to change the date for providing notice for water rights applications to a later time in the application review process so that notice will be provided to those potentially affected persons existing at a time closer to commission action on an application. The proposed amendment together with a corresponding rulemaking in Chapter 295 would substantially advance this stated purpose by keeping the date of filing an application with the chief clerk at administrative completeness, but changing the date of notice of the application from after administrative completeness to after technical review of the application is complete. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the rule is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking with the Coastal Coordination Act may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 18, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Jessica Rawlings, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-028-295-LS. The comment period closes August 24, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Robin Smith, Environmental Law Division, (512) 239-0463; Sherry Smith, Water Quality Division, (512) 239-0571; or Ronald Ellis, Water Supply Division, (512) 239-1282.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also proposed under Texas Water Code, §11.121, which provides that a person cannot store or divert state water without obtaining a permit from the commission; Texas Water Code, §11.129, which provides for commission review of a water rights application; and Texas Water Code, §11.132, which provides requirements for notice for water rights permits.

The proposed amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 11.121, 11.129, and 11.132.

§281.17. Notice of Receipt of Application and Declaration of Administrative Completeness.

(a) Applications for use of state water. If an application for the use of state water, other than for a permit under §297.13 of this title (relating to Temporary Permit Under the Texas Water Code, §§11.138 and 11.153 - 11.155) or §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139) [~~Emergency Permit~~]), is received containing the information and attachments required by §281.4 of this title (relating to Applications for Use of State Water), the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness [~~suitable for mailing or publishing, and a brief technical summary of the application to assist the chief clerk~~]. The executive director shall forward a copy of the statement [~~and brief technical summary~~] to the chief clerk, along with a copy of the application. [~~The chief clerk shall notify every person entitled to notification of the filing of an application under §295.153 of this title (relating to Notice by Mail) by mail in the manner provided therein.~~]

(b) Applications for temporary permits to use state water. If an application for a temporary permit, other than a provisional temporary permit under §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit [~~Applications for Temporary Permits; Provisional Issuance in Certain Cases~~]), for the use of state water is received containing the required information and attachments required by §281.4 of this title [~~(relating to Applications for Use of State Water)~~] as set forth therein, the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness [~~suitable for mailing or publishing~~], and shall forward a copy of the statement to the chief clerk. [~~The chief clerk shall mail a copy of the statement of the receipt of the application and declaration of administrative completeness to every water rights holder~~

~~of record with the commission who would be entitled to notice of hearing under §295.154 of this title (relating to Notice for Temporary Water Use Permit).~~]

(c) Applications for provisional temporary permits to use state water. When an application for a provisional temporary permit for the use of state water under §295.181 of this title [~~(relating to Application for Temporary Permits; Provisional Issuance in Certain Cases)~~], is received containing the information and attachments required by §281.4 of this title [~~(relating to Applications for Use of State Water)~~], the chief clerk shall cause notice of the receipt of the application and declaration of administrative completeness to be published in the *Texas Register*. The chief clerk may include in the notice other information concerning the disposition of the application.

(d) Other applications. Upon receipt of an application described in §281.2(2) or (5) - (11) of this title (relating to Applicability), which contains the information and attachments required by §§281.5, 281.6, [~~- 281.7~~] and 281.16 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits; Applications for Plan Approval of Reclamation Projects; [~~Applications for Weather Modification Permits;~~] and Applications for Certificates of Convenience and Necessity), the executive director or his designee shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative completeness which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed injection well permit, for a new, amended, or renewed industrial solid waste permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title, the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed radioactive material license as described in Chapter 336 of this title (relating to Radioactive Substance Rules), the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for mailing and shall forward that statement to the chief clerk prior to the expiration of the administrative review periods established in §281.3(d) of this title (relating to Initial Review). The chief clerk shall notify every person entitled to notification of a particular application under the rules of the commission.

(e) Notice requirements. The notice of receipt of the application and declaration of administrative completeness, or for applications for a new, amended, or renewed injection well permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title [~~(relating to Applicability)~~], the notice of receipt of the application, shall contain the following information:

(1) the identifying number given the application by the executive director;

(2) the type of permit or license sought under the application;

(3) the name and address of the applicant and, if different, the location of the proposed facility;

(4) the date on which the application was submitted; and

(5) a brief summary of the information included in the application.

(f) Notice of application and draft permit. Nothing in this section shall be construed so as to waive the requirement of notice of the application and draft permit in accordance with Chapter 39 of this title (relating to Public Notice) for applications for radioactive material licenses, and for wastewater discharge, underground injection, hazardous waste, municipal solid waste, and industrial solid waste management permits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 10, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 239-0177

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CHAPTER 295. WATER RIGHTS, PROCEDURAL

SUBCHAPTER C. NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

30 TAC §295.151, §295.158

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) proposes amendments to §295.151 and §295.158.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking will change the time that notice of an application for a new or amended water right will be mailed and published. Texas Water Code, Chapter 11 does not provide the timing of the notice of application other than that it must be at least 30 days prior to commission consideration of the application. Currently, the notice of the application is sent after the executive director finds the application is administratively complete and files the application with the chief clerk. The proposed amendments would change that time to after the executive director has completed its technical review of the application and filed its memoranda and recommendations with the chief clerk. This change in timing of the notice will allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice, and Chapter 281, Applications Processing.

This rulemaking will not apply to any application for a water right permit if notice has been issued for that application at the time that these rules become effective.

SECTION BY SECTION DISCUSSION

The proposed amendment to §295.151(a) requires notice of an application for a permit to use state water after the technical review is complete and the technical memoranda are filed with the chief clerk, rather than after the executive director has declared the application administratively complete and filed it with

the chief clerk. The proposed amendment will change the time in the application process at which notice will be issued. It will make the results of the executive director's technical review available to the public at the time of notice. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Section 295.151(b) is a list of items required to be included in the notice. The proposed change to the heading of the list will edit the language to clarify the list's purpose.

The proposed amendment to §295.151(b)(3) adds reference to the rule, being §281.17(a) or (b), under which the application is filed with the chief clerk.

The proposed amendment to §295.151(b)(4) requires the notice to state that the technical review of the application is complete rather than stating that the application is administratively complete. This change makes the requirement consistent with the proposed change to §295.151(a).

Proposed §295.151(b)(9) requires the executive director's recommendation on the application to be added to the notice. This requirement will give potentially affected persons more information about the application.

Existing §295.151(b)(9), requiring the notice to specify the time and location where the commission will consider the application, is repealed. The time of commission action is unknown at the time of notice, and is made known to potentially affected parties through a separate notice required by other rules.

Proposed §295.151(b)(10) requires the notice to state that an affected person may request a hearing as set out in 30 TAC Chapter 55, Subchapter G. This change is helpful to public participation as it clarifies the options for affected persons.

Existing §295.151(b)(10) is renumbered to §295.151(b)(11) to accommodate the addition of new requirements in the proposed §295.151(b)(10).

Proposed §295.151(b)(11) requires that the notice give a general description of the location and any land to be irrigated. This requirement is being moved from the existing §295.151(b)(10).

Existing §295.151(b)(11) is renumbered to §295.151(b)(12) to accommodate the addition of new requirements in the proposed §295.151(b)(10).

Proposed §295.151(b)(12) requires that the notice give any additional information that the commission considers necessary. This requirement is being moved from the existing §295.151(b)(11).

The commission proposes an administrative change to §295.158(a)(1) to correct a spelling error.

The proposed amendment to §295.158(c)(1) requires that the commission consider whether notice of an application to amend an existing permit, certified filing, or certificate of adjudication is required upon completion of the technical review of the application and filing of the technical memoranda rather than upon filing of the application. This rule amendment will change the time in the amendment application process at which notice, if required, will be issued. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules affect when notice of application for a new or amended water right is to be mailed and published. Any fiscal impacts regarding the change in date to notify potentially affected parties is expected to be minimal.

The proposed amendments to Chapter 295 are part of corresponding rule proposals regarding when public notice is mailed or published that also includes amendments to Chapters 39 and 281. The fiscal impacts of the proposed amendments to those chapters are detailed in separate fiscal notes.

Currently, notice of an application for a new or amended water right is mailed or published after the executive director finds the application to be administratively complete and files the application with the chief clerk. The proposed amendments to Chapter 295 will change the current deadline of notice mailing or publication to a later date after the executive director has completed the technical review of the application and has filed his memoranda and recommendations with the chief clerk. Changing the time by which notice is to be mailed and published will provide the public with more information concerning agency technical review and recommendations. The timing change will also ensure that the most current membership of the population base in the affected area is informed of the water right application.

The proposed rulemaking is not expected to have a significant fiscal impact on local governments since the rule will only affect the date of notice mailing and publication for water rights permits. The content requirements and substance requirements of notice will not change, and therefore, any cost increases or decreases should be minimal. It is not known if more public hearings will be requested by providing the public with more information concerning agency technical review and recommendations. Providing notice at a later date in the permit process may include potentially affected parties who were not part of the original population affected by a permit. However, providing more information concerning the permit application could satisfy any concerns that newer potentially affected parties might have.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be ensuring the current public potentially affected by the application has notice of water rights and has more information concerning results of technical reviews and agency recommendations.

The proposed rulemaking is not expected to have a significant fiscal impact on businesses since the rulemaking will only affect the date of notice mailing and publication for water rights permits. The content requirements and substance requirements of notice will not change, but potentially affected parties will have more information concerning the results of technical reviews and agency recommendations.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. The proposed rulemaking will only affect the date of notice mailing and publication for water rights permits.

The content requirements and substance requirements of notice will not change, but potentially affected parties will have more information concerning the results of technical reviews and agency recommendations. Any cost impacts of the proposed rules are expected to be minimal.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated these proposed rules and performed an analysis of whether these proposed rules require a regulatory impact analysis under Texas Government Code, §2001.0225. These amendments are not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure and they do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to change the timing of notice of an application for a new or amended water right from after the application is administratively complete to after the completion of technical review of the application. This change is to ensure greater public notice of these applications by having the most current list of potentially affected persons when notice is issued. The proposed rules would substantially advance this stated purpose by amending the notice rules for water rights to specify that notice is after technical review. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules are procedural only and do not impact property rights in any way. There are no other reasonable or practicable alternatives to this rulemaking.

Written comments on the draft takings impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking with the Coastal Coordination Act may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 18, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Jessica Rawlings, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-028-295-LS. The comment period closes August 24, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Robin Smith, Environmental Law Division, 512-239-0463; Sherry Smith, Water Quality Division, 512-239-0571; or Ronald Ellis, Water Supply Division, 512-239-1282.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendments are also proposed under Texas Water Code, §11.129, which provides for commission review of a water rights application, and Texas Water Code, §11.132, which provides for notice of water rights applications.

The proposed amendments implement Texas Water Code, §§5.102, 5.103, 5.105, 11.129, and 11.132.

§295.151. Notice of Application and Commission Action.

(a) At the time that the technical review of an application for a permit to use state water has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the commission shall give notice by mail to those persons specified in §295.153 of this title (relating to Notice By Mail). At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant shall cause such notice to be published, pursuant to §295.152 of this title (relating to Notice by Publication).

(b) The [~~A~~] notice must [~~of application and commission action shall~~]:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is [~~administratively~~] complete;

(5) state the application number;

(6) state the type of permit the applicant is seeking;

(7) state the purpose and extent of the proposed appropriation of water;

(8) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;

(9) state the executive director's recommendation regarding the application [~~specify the time and location where the commission will consider the application~~];

(10) state that an affected person may request a hearing as set out in Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications);

(11) [~~(10)~~] give a general description of the location and area of any land to be irrigated; and

(12) [~~(11)~~] give any additional information the commission considers necessary.

§295.158. Notice of Amendments to Water Rights.

(a) On motion of executive director.

(1) If the executive director determines to file a petition to amend a water right, notice of the determination stating the grounds therefore [~~therefor~~] and a copy of a proposed amendment draft shall be personally served on or mailed by certified mail to the water right holder at the last address of record with the commission.

(2) This notice shall be given at least 15 days before a petition is filed with the commission.

(b) Requiring mailed and published notice. Unless authorized by subsection (c) of this section, applications for amendments to permits, certified filings, or certificates of adjudication, including, but not limited to, those of the following nature, must comply with requirements for a water use permit, including the notice requirements in the Texas Water Code, §11.132, and this subchapter:

(1) to change the place of use when other water users of state water may be affected;

(2) to increase an appropriation and/or rate or period of diversion;

(3) to change the purpose of when the change would authorize a greater consumption of state water or would materially alter the period of time when state water could be diverted;

(4) to add points of diversion which would result in a greater rate of diversion or impair other water rights;

(5) to remove or modify the requirements or conditions of a water right which were included for the protection of other water rights;

(6) to change a point of diversion which may impair other water rights;

(7) to relocate or enlarge a reservoir; or

(8) to extend the period of duration of any term permit.

(c) Not requiring mailed and published notice.

(1) Only an application to amend an existing permit, certified filing, or certificate of adjudication which does not contemplate an additional consumptive use of state water or an increased rate or period of diversion and which, in the judgment of the commission, has no potential for harming any other existing water right, is subject to amendment by the commission without notice other than that provided to the record holder. Once the technical review of an application is complete and the technical memoranda have been filed with the chief clerk of the commission [~~Upon filing such an application~~], the commission shall consider whether additional notice is required based on the particular facts of the application.

(2) Applications of the following descriptions may not require additional notice:

(A) to cure ambiguities or ineffective provisions in a water right;

(B) to reduce an appropriation or rate of diversion;

(C) to change the place of use when there will be no increased use of state water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required;

(D) to change the point of diversion when the existing rate of diversion will not be increased and there are no interjacent water users of record between the originally authorized point of diversion and the new one, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(E) to add additional points of diversion where the existing rate of diversion will not be increased and there are no water users of record between any originally authorized point of diversion and the new one to be added, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(F) to increase the rate or period for diversion from a storage reservoir.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 10, 2009.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL FISH, SHELLFISH, AND AQUATIC PLANTS

The Texas Parks and Wildlife Department proposes the repeal of §57.136, an amendment to §57.113, and new §57.136 and §57.137, concerning Harmful or Potentially Harmful Fish, Shellfish, and Aquatic Plants. The proposed repeal, amendment, and new sections are necessary to establish special provisions for the culture and sale of water spinach.

Under Parks and Wildlife Code, §66.007, no person may import, possess, sell, or place into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the department.

Water spinach (Ipomoea aquatica) is an exotic aquatic plant native to southeast Asia, where it is a popular vegetable crop that has been cultivated for centuries. It is a fast-growing plant that thrives in warm, moist environments. Water spinach is a noxious species in areas where it has escaped containment. Owing to its prolific growth rate, it is a concern because it can infest lakes, ponds and river shorelines, displacing native plants that are important for fish and wildlife, and because it can block drainage structures, it can create ideal breeding environments for mosquitoes.

Water spinach has been classified as a noxious plant by the federal government, and is prohibited in many states. Possession of water spinach was prohibited in Texas until 2005, when the department discovered that southeast Asian immigrants in the Houston area had been growing and selling it undetected for over two decades. The department initiated survey efforts in an effort to determine if water spinach was growing in the wild in the Houston area and concluded that it was not. On that basis, the department in 2006 allowed the possession of water spinach for personal consumption while it developed a risk analysis to determine the potential environmental hazards associated with allowing culture and sale.

The department's risk analysis was completed earlier this year and concluded that water spinach is a low-risk species that can be cultured and sold with little potential for environmental hazard in Texas, provided it is strictly regulated. The proposed rules would implement a regulatory regime to require persons who grow water spinach for any purpose to acquire an exotic species permit issued by the department (in addition to any other permits required by other governmental entities). The proposed rules would establish facilities standards, require facility inspections, impose recordkeeping and reporting requirements, and prescribe processing and packaging standards, including standards for transportation. The intent of this rulemaking is to allow the culture and sale of water spinach without placing onerous administrative and regulatory burdens on consumers, while simultaneously providing a mechanism for the department to identify and monitor the points of origin of water spinach, which is intended to allow the department to react in a timely and effective fashion to protect native ecosystems in the event that water spinach is detected in the wild. To this end, the proposed rules would require only those persons who grow water spinach to obtain an exotic species permit. Persons who purchase water spinach for a commercial purpose would be required only to maintain invoices and sales receipts. Persons who purchase water spinach for personal consumption (e.g., diners, grocery store customers, etc.) would not be required to obtain a permit or maintain records. The proposed rules would be in addition to any other provisions of the department's existing rules governing possession of harmful and potentially harmful exotic aquatic plants.

The proposed amendment to §57.113, concerning Exceptions, would eliminate references to water spinach in subsections (d) and (m), which is necessary to prevent conflicts with proposed new §57.136, which would address all regulatory provisions specific to water spinach.

Proposed new §57.136, concerning Special Provisions--Water Spinach, would establish provisions unique to the issuance of exotic species permits for the culture of water spinach. All other provisions of the subchapter would continue to apply, except where expressly noted.

Proposed new §57.136(a) would set forth general provisions related to the culture of water spinach.

Proposed new §57.136(a)(1) would restrict the application of the section to the culture, possession, transport, sale, re-sale, and transfer of water spinach, which is necessary because the department does not intend for the section to apply to any other species of harmful or potentially harmful fish, shellfish, or aquatic plant.

Proposed new §57.136(a)(2) would require any person who grows water spinach for a commercial purpose to obtain an exotic species permit from the department. The proposed new would also define "commercial purpose" as "the act of growing, possessing, or transporting water spinach in exchange for money or anything of value or offering to grow, possess, or transport water spinach in exchange for money or anything of value." The definition is necessary to create a standard for determining the conditions under which an exotic species permit must be obtained. The proposed new paragraph also would create two exceptions under which persons are not required to obtain an exotic species permit.

The first exception, set forth under proposed new §57.136(a)(3), would authorize the possession, purchase, and re-sale of water spinach obtained from a permitted source in Texas or a lawful out-of-state source, provided the water spinach is processed and packaged in accordance with all applicable food processing

and handling laws; exotic species invoices and sales receipts are maintained for two years; any water spinach sold or transferred is sold or transferred to a consumer (defined as a person obtaining water spinach for personal consumption); and any water spinach not sold, transferred, or consumed is disposed of in such a way as to prevent release into the environment. As mentioned previously, the department's intent is to provide protection to the environment while minimizing regulatory burdens on people involved in water spinach commerce and consumers. For persons who obtain water spinach from a permitted grower or lawful out-of-state source for a commercial purpose, the department believes it is sufficient to require only that applicable food processing and handling laws be followed, that sales receipts and invoices be retained for a period of two years, and that excess or unwanted water spinach be properly disposed of. The need to follow legal requirements for food safety is self-evident. The proposed requirement to maintain invoices and sales receipts is necessary to provide a way for the department to follow a chain of possession to determine that water spinach being offered for sale in the state comes from known, regulated sources. The proposed requirement to safely dispose of unused or unsold water spinach is necessary to ensure that water spinach is not carelessly discarded, which could lead to establishment of populations in the wild.

The second exception, set forth in proposed new §57.136(a)(4), would allow any person to possess water spinach for personal consumption without having to obtain an exotic species permit. The proposed provision is necessary to allow restaurant and grocery store patrons to purchase and possess water spinach as end users.

Proposed new §57.136(a)(5) would require a person who seeks to obtain an exotic species permit for the culture of water spinach to provide a Texas driver's license or identification number and a Social Security number to the department as part of the permit application process. The proposed provision is necessary to establish the legal identity of all persons who culture water spinach so the department can prosecute violators and prevent convicted offenders from obtaining permits under the provisions of proposed new §57.136(g). The department is also required by state and federal law to collect social security numbers from all persons to whom the department issues recreational or commercial permits.

Proposed new §57.136(a)(6) would prohibit the use of water spinach as fodder or forage for animals. The proposed provision is necessary to prevent the establishment of water spinach in the wild. The rules as proposed impose standards that require water spinach to be confined within physical structures or within closed containers, which is necessary because of its potential to grow in the wild if it escapes. Therefore, the feeding of water spinach to animals, particularly in low-lying areas and other areas where water is abundant and occasionally prone to flooding, is obviously a practice that should be prohibited.

Proposed new §57.136(b) would allow persons who hold a valid exotic species permit for the culture of water spinach to designate additional persons to engage in permitted activities under the person's permit. The proposed provision is necessary because a culture operation may involve more than one person. The department does not wish to create a costly administrative structure for itself, nor does it wish to require persons who are employed by permittees to be subject to provisions that the permittee must comply with and that are sufficient for the department's purposes.

Proposed new §57.136(c) would establish facility requirements specific to facilities where water spinach is cultured. The department has determined that although the potential for water spinach to become established in the wild is slight, it is nonetheless reasonable and prudent to establish specific standards to prevent escapement.

Proposed new §57.136(c)(1) would require water spinach to be cultured only in enclosed greenhouses. The proposed provision is intended to isolate production within a physical structure and maintain a sterile zone around the structure, which is necessary to ensure that water spinach is under control at all times.

Proposed new §57.136(c)(2) would require all water spinach plants on a permitted property to be kept free of seeds and flowers at all times. The proposed provision is intended to prevent the natural reproduction of water spinach, because seeds could be easily transported or scattered by accident, which increases the potential for establishment in the wild.

Proposed new §57.136(c)(3) would require all propagation of water spinach to be by cuttings only. As noted in the discussion of proposed new §57.136(2), seeds present a potential risk for establishment in the wild. However, water spinach also reproduces by fragmentation (existing stems can be rooted and will grow readily), so the proposed rule would prohibit propagation by seed and require propagation only by cuttings.

Proposed new §57.136(c)(4) would require water spinach to be cultured only in moist soil. Water spinach can and does grow as a floating plant. The highest risk potential for establishment in the wild is via aqueous transmission. By requiring water spinach to be cultured only in moist soil, the department's intent is to minimize risk of escape as a result of flood events or in areas where there is abundant surface water.

Proposed new §57.136(c)(5) would require that all areas where water spinach is cultured, handled, packed, processed, stored, shipped, or disposed of to be enclosed within a minimum 10-ft buffer zone void of all vegetation. The proposed provision would isolate water spinach within a sterile zone during all stages of handling and shipping, which is necessary to ensure that water spinach is under control at all times.

Proposed new §57.136(c)(6) would require that all handling, packaging, and disposal or water spinach be done at the facility and in a manner to prevent dispersal. The proposed new provision is necessary to minimize the potential for water spinach to escape to the wild.

Proposed new §57.136(c)(7) would require all equipment used to cultivate water spinach to be cleaned of all vegetation prior to removal from a facility. Because water spinach can propagate vegetatively, it is important that equipment that comes into contact with water spinach be cleaned before being taken elsewhere in order to minimize the potential for escape to the wild.

Proposed new §57.136(d) would set forth requirements for the transport and packaging of water spinach.

Proposed new §57.136(d)(1) would define a "package" of water spinach as "a closed or sealed container having a volume of no greater than three cubic feet, accompanied by all required invoices and documentation," and would require that a package contain only water spinach. The department has determined that a maximum package size is necessary to facilitate inspection and verification. The three-cubic-feet standard was selected because it represents a volume that can be readily and easily measured and inspected. The requirement that a package contain

only water spinach is necessary because the intent of this rulemaking is to restrict facilities to monoculture production. Allowing facilities to culture and package other types of plants or foodstuffs increases the risk of escape and decreases the department's ability to monitor activities to ensure that water spinach is being handled, processed, and packaged in such a fashion as to minimize escapement. The requirement that each package of water spinach be accompanied by all documentation and invoices is necessary to maintain a chain of custody for law enforcement purposes. Since only the grower is required to obtain a permit, it is necessary for documentation and invoices to remain with water spinach as it proceeds through commerce, giving the department the ability to track water spinach back to a point of origin and verify that it was lawfully grown, processed, and shipped. Absence of documentation and invoices would therefore be evidence that water spinach is unlawfully possessed.

Proposed new §57.136(d)(2) would specify that each package of water spinach be clearly identified, in English, as water spinach. The proposed new provision is necessary to avoid problems with identification of the contents of packages at various points in the chain of commerce. The requirement that the label be in English is necessary because water spinach is known by many different names in various cultures, including many cultures that have ideogrammatic rather than phonetic languages.

Proposed new §57.136(d)(3) would require all water spinach removed from a facility for any reason to be accompanied by a transport invoice and would prescribe the information to be contained on the invoice. The invoice requirement is necessary because only the grower of water spinach is required to obtain a permit. Therefore, the department must have a way to determine that water spinach encountered outside of permitted facilities is lawfully possessed and lawfully grown. By requiring all water spinach removed from a facility to be accompanied by a transport invoice, the department can compare invoice information to the quarterly reports required from the growers to determine whether the water spinach was lawfully cultured.

Proposed new §57.136(e) would prescribe reporting and recordkeeping requirements for persons culturing water spinach under an exotic species permit issued by the department.

Proposed new §57.136(e)(1) would require permittees to maintain an accurate daily record of all sales and transfers of water spinach. The proposed new provision is necessary to ensure that all activities involving the sale or movement of water spinach are recorded in real time. By requiring daily recordkeeping, the department intends to avoid situations in which verification of the origin of water spinach encountered in places other than a permitted facility hinge on memory or hearsay.

Proposed new §57.136(e)(2) would require transport invoices to be retained by both the shipper and receiver of water spinach for a period of two years from the date of delivery. The proposed new provision is necessary to facilitate investigations when they are necessary. The two-year period was selected because that is the statute of limitations for an offense under the subchapter.

Proposed new §57.136(e)(3) would require all documents and records required by the section to be furnished upon request during normal business hours to a department employee acting within the scope of official duties. The proposed new provision is necessary because the department must be able to review records and documents to enforce the provisions of the section, to conduct investigations when necessary, and to verify that permittees are in compliance with the provisions of the subchapter.

Proposed new §57.136(f) would require a permittee to be financially responsible for the costs of detecting, controlling, and eradicating water spinach that escapes from the permittee's facility. The proposed new provision is necessary because the department believes that since water spinach has the potential to become an environmental nuisance, a person who has been entrusted with the privilege of culturing and handling water spinach under a permit should be financially liable for remediating an escapement from a facility.

Proposed new §57.136(g) would provide that a final conviction of a violation of the section is grounds for the department to deny further permit issuance for a period of five years from the date of the convictions. The proposed new provision is necessary because the department believes that a person who has demonstrated disregard for rules designed to protect the natural resources of this state should be prevented from obtaining the privilege of a permit for a reasonable amount of time, which is also intended to function as a deterrent to unscrupulous activities and carelessness.

Proposed new §57.136(h) would stipulate that no person is relieved of the responsibility of complying with other applicable provisions of federal, state, or local laws. The proposed new provision is necessary to clearly state that a permit issued under the subchapter is applicable only to activities governed by the Parks and Wildlife Code.

The proposed repeal of current §57.136, concerning Penalties, would relocate the provisions of that section to proposed new §57.137, which is necessary in order to create room for proposed new §57.136.

Proposed new §57.137, concerning Penalties, would reiterate the statutory penalties for a violation of the subchapter.

Mr. Earl Chilton, Invasive Species Program Director, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local government as a result of enforcement or administration of the rules.

Mr. Chilton also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the ability of persons to engage in the culture and sale of water spinach under rules that will minimize the potential of environmental damage.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rules, because it is unlawful at the current time to culture or possess water spinach for a commercial purpose. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006. For the same reason, there will be no adverse economic effect on persons required to comply with the rules as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022,

as the agency has determined that the rules as proposed will exert a positive impact on local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Mr. Earl Chilton, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4652; e-mail: earl.chilton@tpwd.state.tx.us.

31 TAC §§57.113, 57.136, 57.137

The amendment and new rules are proposed under the authority of Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the department and requires the department to make rules to carry out the provisions of that section.

The proposed amendment and new rules affect Parks and Wildlife Code, Chapter 66.

§57.113. Exceptions.

(a) A person who holds a valid Exotic Species Permit issued by the department may possess, propagate, sell and transport to the permittee's private facilities exotic harmful or potentially harmful fish, shellfish and aquatic plants only as authorized in the permit provided the harmful or potentially harmful exotic species are to be used exclusively:

(1) as experimental organisms in a department approved research program; or

(2) for exhibit in a public aquarium approved for display of harmful or potentially harmful exotic fish, shellfish and aquatic plants.

(b) A person may possess exotic harmful or potentially harmful fish or shellfish, exclusive of grass carp, without a permit, if the fish or shellfish have been gutted, or in the case of oysters, if the oysters have been shucked or otherwise removed from their shells.

(c) A person may possess grass carp harvested from public waters that have not been permitted for triploid grass carp, without a permit, if the grass carp have been gutted.

(d) A person who holds a valid exotic species permit issued by the department may possess, propagate, transport or sell [~~water spinach,~~] triploid grass carp, bighead carp, blue tilapia (Oreochromis aureusa), Mozambique tilapia (O. mossambica), Nile tilapia (O. nilotocusa), or hybrids between the three tilapia species, unless otherwise provided by conditions of the permit or these rules.

(e) An aquaculturist who holds a valid exotic species permit issued by the department may possess, propagate, transport, or sell Pacific white shrimp (Litopenaeus vannamei) provided the exotic shellfish meet disease free certification requirements listed in §57.114 of this title (relating to Health Certification of Harmful or Potentially Harmful Exotic Shellfish) and as provided by conditions of the permit and these rules.

(f) An operator of a wastewater treatment facility in possession of a valid exotic species permit issued by the department may possess and transport permitted exotic species to their facility only for the purpose of wastewater treatment.

(g) A person may possess Mozambique tilapia in a private pond or private facility subject to compliance with §57.116(d) of this title (relating to Exotic Species Transport Invoice).

(h) The holder of a valid triploid grass carp permit issued by the department may possess triploid grass carp as provided by conditions of the permit and these rules.

(i) A licensed retail or wholesale fish dealer is not required to have an exotic species permit to purchase or possess:

(1) live individuals of triploid grass carp, bighead carp, blue tilapia, Mozambique tilapia, Nile tilapia or hybrids of those species held in the place of business, unless the retail or wholesale fish dealer propagates one or more of these species. However, such a dealer may sell or deliver these species to another person only if the fish have been gutted or beheaded; or

(2) Live Pacific white shrimp (Litopenaeus vannamei) held in the place of business if the place of business is not located within the exclusion zone described in §57.111 of this title (relating to Definitions). However, such a dealer may only sell or deliver this species to another person if the shrimp are dead and packaged on ice or frozen.

(j) The department is authorized to stock triploid grass carp into public waters in situations where the department has determined that there is a legitimate need, and when stocking will not affect threatened or endangered species, coastal wetlands, or specific management objectives for other important species.

(k) An aquaculturist who holds a valid exotic species permit issued by the department may possess, propagate, transport and sell Pacific blue shrimp (Litopenaeus stylirostris) provided the exotic shellfish are cultured under quarantine conditions in private facilities located outside the harmful or potentially harmful exotic species exclusion zone, and meet disease free certification requirements listed in §57.114 of this title [~~(relating to Health Certification of Exotic Shellfish)~~] and as provided by conditions of the permit and these rules.

(l) A person operating a mechanical plant harvester in accordance with the provisions of a valid exotic species permit issued by the department may remove and dispose of prohibited plant species from public or private waters only by means authorized in the permit.

~~[(m) Any person may possess water spinach for personal consumption.]~~

§57.136. Special Provisions--Water Spinach.

(a) General provisions.

(1) The provisions of this section apply only to the culture, possession, transport, sale, re-sale, and transfer of water spinach.

(2) Except as provided in paragraphs (3) and (4) of this subsection, no person may grow water spinach, or possess or transport water spinach for a commercial purpose, unless that person possesses a valid exotic species permit issued by the department for that purpose. A commercial purpose is defined as the act or intent of growing, possessing, or transporting water spinach in exchange for money or anything of value or offering to grow, possess, or transport water spinach in exchange for money or anything of value.

(3) No permit issued under this section is required to purchase or obtain water spinach for sale or re-sale, provided:

(A) the water spinach is purchased or obtained from a lawful out-of-state source or person legally authorized under this section to grow water spinach;

(B) the water spinach is processed and packaged in accordance with applicable local, state and federal laws governing the processing and handling of food for sale to the public;

(C) copies of all invoices and receipts are retained for a period of two years following the date of purchase or receipt;

(D) the water spinach is sold or transferred directly to a consumer (defined as a person purchasing or obtaining water spinach for personal consumption); and

(E) water spinach that is not sold, transferred or consumed is disposed of in such a manner as to prevent the dispersal of water spinach beyond the establishment or location where it is sold or stored.

(4) No permit issued under this section is required to purchase or possess water spinach for personal consumption, provided the water spinach was lawfully purchased or obtained.

(5) In addition to the requirements of §57.117 of this title (relating to Exotic Species Permit: Application Requirements), an applicant for an exotic species permit under this section shall submit a Texas driver's license or identification number issued in the applicant's name and the applicant's Social Security number as part of the application process.

(6) The use of water spinach to feed domestic or exotic livestock is prohibited.

(b) Subpermittees. A permittee may designate additional persons to conduct permitted activities under the permittee's exotic species permit as subpermittees. A subpermittee must be named on the exotic species permit issued by the department, and the permittee shall furnish the full legal name, physical address, Texas driver's license or identification number, and Social Security number for each subpermittee on the original application for an exotic species permit and any amendments to an exotic species permit.

(c) Facility requirements. In addition to the provisions of this subchapter applicable to a facility where harmful or potentially exotic fish, shellfish, or aquatic plants are cultured, the following provisions apply to the culture of water spinach:

(1) water spinach shall be cultured only in enclosed greenhouses;

(2) all water spinach plants on the property where the facility is located must be free of flowers and seeds at all times;

(3) propagation shall be by cuttings only; seeds are prohibited;

(4) water spinach shall be grown in only in moist soil; aqueous media are prohibited;

(5) a buffer area of at least 10 feet in width and void of all vegetation must be maintained around the perimeter of all areas where water spinach is cultured, handled, packed, processed, stored, shipped, or disposed of;

(6) all handling, packaging, and disposal of water spinach by a permittee must be done at the permitted facility and in such a manner as to prevent dispersal; and

(7) all equipment used in the cultivation of water spinach must be cleaned of all vegetation prior to being removed from a facility.

(d) Transport and packaging requirements.

(1) All water spinach transported from a facility shall be packaged in compliance with this section. A package is defined as a closed or sealed container having a volume no greater than three cubic feet, accompanied by all required invoices and documentation. A package shall contain water spinach only.

(2) Each package of water spinach shall be identified by a label placed on the outside of the package. The label must be clearly visible and shall bear the legend "Water Spinach" in English.

(3) No person may remove water spinach from a permitted facility for any reason unless the water spinach is accompanied by a transport invoice. A transport invoice shall contain the following information, legibly written:

(A) a unique invoice number (invoice numbers shall be sequential);

(B) date of shipment;

(C) name, address and phone number of shipper;

(D) name, address and phone number of receiver;

(E) if applicable, the aquaculture license number of the shipper and receiver; and

(F) if applicable, the exotic species permit number of the shipper and receiver.

(e) Reporting and recordkeeping requirements.

(1) A person permitted under this section to grow water spinach must maintain an accurate daily record of all sales and/or transfers of water spinach from each permitted facility and submit quarterly reports to the department on a form supplied by the department. The quarterly reports required by this paragraph are due by September 15, December 15, March 15, and June 15 of each year.

(2) A copy of the transport invoice shall be retained by both the shipper and the receiver for a period of two years from the date of delivery of the shipment.

(3) All records and documents required by this section shall promptly be provided upon request during normal business hours to any department employee or peace officer acting within the scope of official duties

(f) Remediation. In the event that water spinach escapes or is improperly or unlawfully dispersed from a facility, the permittee is responsible for all costs associated with the detection, control, and eradication of free-growing water spinach resulting from such escape or dispersal.

(g) A final conviction for a violation of this section is grounds for the department to deny issuance of a permit under this section for a period of five years from the date of conviction. The department will not authorize the designation of any person as a subpermittee if that person has been convicted of a violation of this section within the five-year period preceding a request for subpermittee status.

(h) Nothing in the section shall be construed to relieve any person of any other applicable requirements of federal, state, or local law.

§57.137. Penalties.

The penalties for violation of this subchapter are prescribed by Parks and Wildlife Code, §66.012 and Agriculture Code, §134.023.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902838
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 389-4775

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31 TAC §57.136

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under the authority of Parks and Wildlife Code, §66.007, which prohibits the importation, possession, sale, or placement into water of this state exotic harmful or potentially harmful fish, shellfish, or aquatic plants except as authorized by rule or permit issued by the department and requires the department to make rules to carry out the provisions of that section.

The proposed repeal affects Parks and Wildlife Code, Chapter 66.

§57.136. Penalties.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902839
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 58. OYSTERS AND SHRIMP
SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §58.11, §58.21

The Texas Parks and Wildlife Department proposes amendments to §58.11, concerning Definitions, and §58.21, concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

The proposed amendment to §58.11 would implement the provisions of Senate Bill 2379, enacted by the most recent session of the Texas Legislature, which amended Parks and Wildlife Code, Chapter 76, to add definitions for "barrel of oysters," "natural oyster bed," and "open season." The proposed amendment would add those definitions to the current rule. The proposed amendment also would replace references to the Texas Department of Health Seafood Safety Division, which has been reorganized and renamed, with references to the Texas Department of State Health Services, which is the state agency responsible for health certification of shellfish.

The proposed amendment to §58.21 would close public oyster reefs in the East Bay Approved Area in Galveston Bay for two harvest seasons, which will allow for oyster habitat to repopulate with oysters and for those oysters to reach market size. Private oyster leases would not be affected by the closure. The proposed amendment also would replace a reference in subsection (c) to the Texas Department of Health Seafood Safety Division, which has been reorganized and renamed and is now the Texas Department of State Health Services. The Texas Department of State Health Services is the state agency responsible for health certification of shellfish.

Under Parks and Wildlife Code, §76.033, the department is required to specify the exact area of beds or reefs from which oysters may be taken. Additionally, Parks and Wildlife Code, §76.115, authorizes the commission to close an area to the taking of oysters when the commission finds that the area is being overworked or damaged or the area is to be reseeded or restocked. Under Parks and Wildlife Code, §76.116, oysters cannot be taken from an area that has been closed by the Department of State Health Services (DSHS). DSHS currently allows the harvest of oysters in approved areas of Galveston Bay and the department by permit regulates that harvest.

A pre-Hurricane Ike site assessment showed that the proposed closure area of East Bay, located within the Galveston Bay Complex (made up of West Bay, Trinity Bay, Upper Galveston Bay, East Bay, and Lower Galveston Bay), contained 2,585 productive acres of oyster reef habitat, of which 1,758 acres were public reefs. The remaining 827 acres were contained within 15 private lease sites, controlled by four leaseholders. The last complete pre-Hurricane Ike harvest season for public reefs (November 1, 2007 - April 30, 2008) and private lease reefs (September 1, 2007 - August 31, 2008) in East Bay showed that East Bay accounted for 19% (691,964 lbs.) of coastwide oyster harvest and 25% of total oyster harvest from the Galveston Bay Complex. The 15 private lease sites located within the proposed closure area accounted for 45% (311,010 lbs.) of all oysters harvested from East Bay. Total ex-vessel values (the value of the oysters landed) during that season totaled $2.4 million, 20% of the coastwide value of oyster landings.

When Hurricane Ike struck the Texas gulf coast region on September 13, 2008, it caused extensive damage to the oyster reef habitat in East Bay. The damage was mainly caused by siltation on the reefs and the deposition of sediment on reef material. This siltation does not allow for spat (juvenile oysters) to set on the reef and begin the process of oyster reef repopulation. Sidescan sonar surveys conducted by department staff indicated an approximately 50-60% loss of oyster habitat in Galveston Bay due to heavy sedimentation/siltation and debris over consolidated reefs. The impact was greatest in East Bay, where over 80% of oyster habitat was lost.

In order to repopulate the reefs in East Bay, the department has begun a restoration effort on approximately 20 acres in East Galveston Bay. This effort involves placing additional cultch (reef) material on damaged areas, allowing spat to attach to the material so that restoration can begin. A portion of the 20 acres will be set aside as a research reef. Total oyster reef area permitted for this effort is 350 acres.

The department has determined that the reefs must be closed to harvest for at least two years in order to repopulate the public oyster reefs in East Bay and allow oysters to reach market size.

Robin Riechers, Director of Science and Policy, has determined that for each of the first five years that the proposed rules will be in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the proposed rules.

Mr. Riechers also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be rules that accurately reflect statutory intent and

rules that lead to increased oyster production by repopulating damaged public oyster reefs and allowing those oysters to reach market size.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic affect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be adverse economic effects on small businesses, microbusinesses, and persons required to comply with the amendments as proposed; however, those effects will be minimal as a result of factors unrelated to the rulemaking. The department has determined that most if not all businesses affected by the proposed rules qualify as small or microbusinesses.

The rules as proposed would prohibit the commercial harvest of oysters from public oyster reefs in the East Bay of Galveston Bay. Since it is unlawful to harvest oysters for a commercial purpose without having acquired a commercial oyster fisherman's license from the department, the proposed rules affects only those persons who hold a current commercial oyster fisherman's license. The department requires commercial oyster fisherman to report oyster catch by location, weight, and selling price. During the most recent oyster season (November 1, 2008 - April 30, 2009), 22 licensed commercial oystermen reported landing oysters taken from public reefs in the area proposed for closure. Using the same data, the dollar value of the annual catch from the area proposed for closure ranged from $70,768 to $564, with an average value of $28,031.72. Therefore, the maximum adverse economic impact of the rules would be a revenue loss of $70,768, the minimum adverse economic effect would be a loss of $564, and the average loss would be $28,031.72.

The analysis above does not take into account the effects of Hurricane Ike. Because Hurricane Ike destroyed more than 80% of the oyster reef habitat in East Bay, a viable commercial fishery in that location is a practical impossibility at the present time and for the immediate future. Allowing continued harvest in the damaged area would prolong and perhaps negate recovery of the fishery to pre-hurricane levels. It is a certainty that if the area were to remain open to oyster harvest, there would be a severe reduction in revenue from oyster catch. Therefore, analyzing the adverse economic impact of the rules on small and microbusinesses, based on an 80% reduction in harvest, the department estimates that the maximum adverse economic impact to small and microbusinesses affected by the rules would be a revenue loss of $14,153.60, the minimum adverse economic impact would be a loss of $112.80, and the average loss would be $5,606.34. The department acknowledges that an 80% reduction in habitat does not correlate exactly to an 80% reduction in harvest, but it provides an estimate of loss that probably underestimates harvest reduction and profits, since more effort would be required to find fewer oysters.

Other than the closure of the East Bay, the proposed rules will not impose additional recordkeeping or reporting requirements; impose taxes or fees; adversely affect market competition; or require the purchase or modification of equipment or services.

The department is considering regulatory options other than the closure of public oyster reefs, including the implementation of seasons and bag limits, means and methods requirements, and the implementation of individual quotas for collection. The rules as adopted may reflect one or more of these approaches as a method of reducing or eliminating impacts to small and microbusinesses while still accomplishing the department's goals of implementing regulations to repopulate oyster reefs in the East Bay of Galveston Bay.

The department has determined that the proposed rules will have very little impact upon local employment at the macro or micro level and hence an insignificant impact upon local economies in the Galveston Bay geographical area. The department has determined that the direct employment impact of the proposed rules in this area will to varying degrees affect a total of 22 licensees who reported harvesting oysters in East Bay. However, because approximately 80% of the oyster populations in East Bay were destroyed by Hurricane Ike, the fishery there for all practical commercial purposes ceases to exist. The department notes that the direct employment impacts of the proposed rules will be positive over time, as the proposed rules are intended to restore a commercially viable fishery.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that the proposed rules are in compliance with Government Code, §505.11 (Actions and Rules Subject to the Coastal Management Program) and §505.22 (Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program).

Comments on the proposal may be submitted to Jeremy Leitz, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4333; email: jeremy.leitz@tpwd.state.tx.us.

The amendments are proposed under Parks and Wildlife Code, §76.301, which authorizes the commission to regulate the taking, possession, purchase, and sale of oysters.

The proposed amendments affect Parks and Wildlife Code, Chapter 76.

§58.11. Definitions.

The following words and terms, when used in the subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Approved area--A molluscan shellfish growing area determined to be acceptable for harvesting of molluscan shellfish for direct marketing according to the National Shellfish Sanitation Program (NSSP).

(2) Barrel of oysters--As defined in Parks and Wildlife Code, §76.001, a barrel of oysters is three boxes of oysters in the shell or two gallons of shucked oysters without shells [~~equal to three boxes~~

~~(bushels) of oysters in the shell~~]. The dimensions of a box are ten inches by 20 inches by 13 1/2 inches. In filling a box for measurement the oysters may not be piled more than 2 1/2 inches above the height of the box at the center. [~~Two gallons of shucked oysters without shells equals one barrel of oysters in the shell.~~]

(3) Conditionally approved area--The classification of a shellfish growing area determined by the Texas Department of State Health Services (TDSHS) [~~Texas Department of Health Seafood Safety Division~~] to meet approved area criteria for a predictable period. The period is conditional upon established performance standards specified in a management plan. A conditionally approved area is a restricted area when the area does not meet the approved growing area criteria.

(4) Commission--Refers to the nine member Texas Parks and Wildlife Department Commission.

(5) Department--Refers to the Texas Parks and Wildlife Department.

(6) Natural oyster bed (reef)--As defined in Parks and Wildlife Code, §76.051, a natural oyster bed is an area where [~~exists when~~] at least five barrels of oysters are found within 2,500 square feet of any position on a reef or bed.

(7) Open season--A period during which it is lawful to take oysters.

(8) [~~(7)~~] Oyster--That species of molluscan shellfish identified as the Eastern oyster, Crassostrea virginica and its subspecies. No other species of molluscan shellfish are included within this proclamation.

(9) [~~(8)~~] Possess--The act of having in possession or control, keeping, detaining, restraining, or holding as owner, or as an agent, bailee, or custodian of another.

(10) [~~(9)~~] Private oyster lease--Those state water bottoms leased from the state for the purpose of producing oysters to individuals or corporations incorporated under the laws of this state.

(11) [~~(10)~~] Prohibited area--The classification of a shellfish growing area determined by the TDSHS [~~Texas Department of Health Seafood Safety Division~~] to be unacceptable for the transplanting, gathering for depuration, or harvesting of shellfish. The only shellfish removal permitted from a prohibited area is for the purpose of depletion, as defined in the Control of Harvesting Section of Part 1 of the NSSP.

(12) [~~(11)~~] Public oyster bed (reef)--As defined in Parks and Wildlife Code, §76.002, all natural oyster beds (reefs) are public. All oyster beds not designated as private are public.

(13) [~~(12)~~] Restricted area--The classification of a shellfish growing area determined by the TDSHS [~~Texas Department of Health Seafood Safety Division~~] to be unacceptable for harvesting of shellfish for direct marketing, but which is acceptable for transplanting or gathering for depuration. A restricted area may be closed for transplanting or gathering for depuration when the Seafood Safety Division determines that the area does not meet the restricted area criteria established in the NSSP.

(14) [~~(13)~~] Sack of oysters--A volume of oysters equivalent to a box that weighs no more than 110 pounds including the sack.

§58.21. Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

(a) Seasons and Times.

(1) The open season extends from November 1 of one year through April 30 of the following year.

(2) Legal oystering hours--sunrise to sunset.

(b) Size Limits and Possession of Undersized Oysters.

(1) Size limit--Legal oysters must be three inches or larger as measured along the greatest length of the shell.

(2) Oysters which are between 3/4 inch and three inches in length must be returned to the reef at the time of harvest.

(3) Unculled oysters shall be kept separate from culled oysters.

(4) It is unlawful for any person to take or possess a cargo of oysters more than 15% of which are between 3/4 inch and three inches measured from beak to bill or along an imaginary line through the long axis of the shell.

(c) Area Closures.

(1) There is no open public season for oysters from areas declared to be restricted or prohibited by the Texas Department of State Health Services or areas closed by the Commission.

(2) Until September 1, 2011, the area eastward of a line beginning at the Intracoastal Waterway Channel Marker 4 at Sievers Cove (29° 25' 51.3", 94° 42' 46.2"), to Galveston Shellfish Marker A (29° 26' 17.2", 94° 43' 28.9"), to Galveston Shellfish Marker B (29° 26' 32.7", 94° 43' 54.5"), to Galveston Shellfish Marker C (29° 26' 57.5", 94° 44' 35.5"), to Galveston Shellfish Marker D (29° 27' 17.2", 94° 45' 07.9"), to Galveston Shellfish Marker E (29° 27' 39.0", 94° 45' 44.0"), to Galveston Shellfish Marker F (29° 28' 01.2", 94° 46' 20.7"), to Galveston Shellfish Marker G (29° 28' 19.7", 94° 46' 51.2"), to Galveston Shellfish Marker H (29° 28' 42.0", 94° 47' 28.0"), to Galveston Shellfish Marker I (29° 29' 13.2", 94° 46' 59.3"), to Galveston Shellfish Marker J (29° 29' 45.4", 94° 46' 29.6"), to Galveston Shellfish Marker K (29° 30' 14.6", 94° 46' 02.8"), to Galveston Shellfish Marker L (29° 30' 45.3", 94° 45' 34.5"), to the Smith Point Tide Gauge Piling (29° 31' 17.9", 94° 45' 04.5") will be closed to the harvest of oysters from public oyster bed (reef) during the open public season.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE

SUBCHAPTER I. DEPREDATION PERMITS

31 TAC §§65.220 - 65.233

The Texas Parks and Wildlife Department proposes new §§65.220 - 65.233, concerning Permits to Control Depredating Wildlife.

House Bill 1965 (H.B. 1965), enacted by the 81st Texas Legislature (Regular Session), amended Parks and Wildlife Code, Chapter 43, Subchapter H, to alter statutory provisions governing the lethal control of wildlife protected by the Parks and Wildlife Code that is causing serious damage to agricultural,

horticultural, or aquacultural interests. (Note: The term "aquiculture" is used in Parks and Wildlife Code, Chapter 43, Subchapter H; however, the more commonly used variant "aquaculture" is used within the proposed rules to avoid confusion.)

Prior to the enactment of H.B. 1965, Parks and Wildlife Code, Subchapter H, provided for the issuance of a permit to kill protected wildlife, provided the applicant presented evidence to a local county judge or mayor clearly showing that the wildlife was causing serious damage to agricultural, horticultural, or aquacultural interests or other property, or was a threat to public safety. Upon receiving notice from a county judge or mayor, the department was required to inspect the property where the damage was alleged to occur and to make recommendations appropriate for controlling the damage or threat. Under the previous law, a person could apply for a permit (hereinafter, "depredation permit") to kill the protected wildlife only if the measures recommended by the department had failed to remedy the problem caused by the depredating wildlife. A depredation permit specifying the time, place, number and type of wildlife to be killed could be issued by the department, and wildlife killed under a permit was required to be donated to a charitable institution, hospital, a needy person, any other appropriate person, or as directed by the court.

H.B. 1965 provides for a more streamlined, efficient, and timely process for controlling wildlife causing serious damage to commercial agricultural, horticultural, or aquacultural interests, or that is a threat to public safety. The provisions of H.B. 1965 eliminate the involvement of county judges and mayors and require persons seeking a depredation permit to apply directly to the department. H.B. 1965, retains the applicability of Subchapter H to situations in which protected wildlife pose a threat to public safety, but eliminates the applicability of the subchapter to situations in which protected wildlife cause damage to property other than agricultural, horticultural, or aquacultural interests, and requires an agricultural, horticultural, or aquacultural interest to be "commercial" in order to qualify for issuance of a depredation permit.

Additionally, H.B. 1965 authorizes the Texas Parks and Wildlife Commission to adopt rules necessary to implement the provisions of Parks and Wildlife Code, Chapter 43, Subchapter H, including rules governing reports, reinstatement of cancelled permits, possession of wildlife resources taken or held under the subchapter, qualifications for permit issuance, and the electronic issuance of permits.

The proposed new rules would establish definitions; general provisions; permit application and issuance standards; inspection requirements; the period of validity for depredation permits; notification requirements; lawful means and methods; documentation, reporting, and recordkeeping requirements; provisions for permit denial, cancellation, and reinstatement; establish fees; and provide for prohibited acts and penalties for violation.

Proposed new §65.220, concerning Definitions, would set forth the meanings for words and terms used in the subchapter. The proposed new section is necessary in order to provide unambiguous meanings so that compliance and enforcement are not problematic.

Proposed new §65.220(1) would define the term "appropriate recipient." Parks and Wildlife Code, §43.155, requires the holder of a depredation permit to dispose of wildlife killed under the permit by donating the wildlife to a charitable institution, a hospital, a needy person, or any other appropriate recipient. The proposed new rules would define "appropriate recipient" as "a person or public or private organization that utilizes the donated wildlife for the public good and not for pecuniary gain." It is clear that under Parks and Wildlife Code, Subchapter H, as amended by H.B. 1965, wildlife killed under a depredation permit is to be used to provide a public and not personal benefit. H.B. 1965 amended Parks and Wildlife Code, §43.155, to stipulate that "the permit holder or a person designated under Section 43.154(c)(4) may not keep or sell any part of the wildlife taken under this subchapter, including antlers." The department therefore intends to ensure that an "appropriate recipient" is an entity or person engaged in an activity that is consistent with Subchapter H, as amended.

Proposed new §65.220(2) would create definitions for the term "evidence of commercial interest." Prior to the enactment of H.B. 1965, Parks and Wildlife Code, §43.151, stipulated that depredation permits could be issued to "agricultural, horticultural, or aquacultural interests." H.B. 1965 amended Parks and Wildlife Code, §43.151, to further restrict eligibility to "commercial" agricultural, horticultural, or aquacultural interests. Since there are agricultural, horticultural, and aquacultural interests that are not commercial in nature, it is therefore necessary to establish criteria that can be used to determine eligibility for the issuance of a depredation permit.

Proposed new §65.220(2) defines "evidence of commercial interest" by providing two mechanisms for demonstrating that the applicant's agricultural, horticultural or aquacultural interests are, in fact, commercial interests. Proposed new §65.220(2)(A) would define "evidence of commercial interest" as an attestation by an applicant for a depredation permit that the applicant either raises crops or products that are sold or exchanged for cash or anything of value, or that the applicant raises crops or products to feed livestock or aquacultural stock that is sold or exchanged for cash or anything of value. As noted earlier, H.B. 1965 provides a more streamlined and efficient method for persons to obtain depredation permits. To that end, the department believes an attestation that serious damage is occurring is an initially sufficient basis to justify permit issuance, provided the applicant complies with all other provisions of the proposed rules.

Proposed new §65.220(2)(B) would define "evidence of commercial interest" as "sales receipts, tax receipts, or other documentation acceptable to the department" that the applicant either raises crops or products that are sold or exchanged for cash or anything of value, or raises crops or products to feed livestock or aquacultural stock that is sold or exchanged for cash or anything of value. The proposed definition is intended to address those situations in which a permittee's original attestation, for whatever reasons, requires verification. The proposed definition is necessary to give the department a mechanism to make a determination that a fraudulent application has been submitted, which by other provisions of the proposed new rules would be a basis for permit cancellation, permit denial, or prosecution.

Proposed new §65.220(3) would establish "depredation permit" to mean a permit issued under the authority of the subchapter. The definition is intended to provide a shorthand term for "permits to control wildlife protected by the Parks and Wildlife Code" and is necessary avoid repetition of an unwieldy phrase.

Proposed new §65.220(4) would define the term "evidence clearly showing serious damage." As amended by H.B. 1965, Parks and Wildlife Code, §43.151 establishes a statutory standard for a person who seeks issuance of a depredation permit.

That standard is "a person who has evidence clearly showing that wildlife protected by this code is causing serious damage to commercial agricultural, horticultural, or aquacultural interests, or is a threat to public safety." Proposed new §65.220(4) defines "evidence clearly showing serious damage" by providing three mechanisms for demonstrating that wildlife protected by the Parks and Wildlife Code are causing serious damage to the applicant's commercial agricultural, horticultural or aquacultural interests. The proposed new provisions are intended to address those situations in which a permittee's attestation, for whatever reasons, requires verification and are necessary to give the department a method of making a determination that a fraudulent application has been submitted, which by other provisions of the proposed new rules would be a basis for permit cancellation, permit denial, or prosecution.

Proposed new §65.220(4)(A) would define "evidence clearly showing serious damage" as an attestation by an applicant for a depredation permit that wildlife protected by the Parks and Wildlife Code is causing serious damage to a commercial agricultural, horticultural, or aquacultural crop or product. As noted earlier, H.B. 1965 provides a more streamlined and efficient method for persons to obtain depredation permits. To that end, the department believes an attestation that serious damage is occurring is an initially sufficient basis to justify permit issuance, provided the applicant complies with all other provisions of the proposed rules.

Proposed new §65.220(4)(B) would define "evidence clearly showing serious damage" as "current or recent photographs or video of commercial agricultural, horticultural, or aquacultural crops or operations demonstrating serious damage caused by wildlife protected by the Parks and Wildlife Code." The proposed definition is necessary to provide the department with the option of requesting tangible proof that damage is occurring in the event an attestation, for whatever reasons, requires verification and is necessary to give the department a method of making a determination that a fraudulent application has been submitted, which by other provisions of the proposed new rules would be a basis for permit cancellation, permit denial, or prosecution.

Proposed new §65.220(4)(C) would define "evidence clearly showing serious damage" as "an affidavit supplied by an agent of Texas AgriLIFE Extension Service attesting to the fact that wildlife protected by the Parks and Wildlife Code is causing serious damage to commercial agricultural, horticultural, or aquacultural crops or products." The proposed definition is intended to provide the department with the option of requiring that the applicant submit expert testimony from an entity that is acknowledged as a reliable source of expertise on the subject of agriculture.

Proposed new §65.220(5) would define the term "destruction of antlers and horns." Proposed new §65.232(5) would require permittees to destroy the antlers or horns of deer, antelope, or bighorn sheep killed under a depredation permit. The proposed definition is necessary because H.B. 1965 amended Parks and Wildlife Code, §43.155, to stipulate that "the permit holder or a person designated under Section 43.154(c)(4) may not keep or sell any part of the wildlife taken under this subchapter, including antlers." In order to ensure that antlers or horns are not sold, it is necessary to require that antlers and horns be destroyed, and, therefore, a definition of what constitutes destruction is in order.

Proposed new §65.220(6) would define the term "protected wildlife" as wildlife protected by the Parks and Wildlife Code. This definition is intended to enhance readability of the subchapter.

Proposed new §65.221, concerning General Provisions, would set forth a number of provisions that are generally applicable to depredation permit activities and permittees.

Proposed new §65.221(a) would stipulate that activities conducted under a depredation permit be conducted only by persons named on the permit. The proposed provision is necessary because wildlife is the property of the people of the state and except under extraordinary circumstances, the killing of wildlife is a privilege enjoyed by persons who purchase a recreational license for that purpose. It is therefore the department's duty to ensure that under extraordinary circumstances, such as the need to control depredating wildlife under a depredation permit, that such activities are carefully regulated.

Proposed new §65.221(b) would provide that a depredation permit authorizes the killing of protected wildlife at any time, irrespective of open seasons and lawful shooting hours. The purpose of the depredation permit is to allow the efficient killing of wildlife causing serious damage to commercial agricultural, horticultural, or aquacultural interests. It is therefore necessary to enable permittees to accomplish this purpose in the most advantageous way possible, which logic dictates should be at any time that it is possible to kill the depredating wildlife.

Proposed new §65.221(c) would provide that a depredation permit may be issued upon a finding by the department that wildlife protected by the Parks and Wildlife Code are a threat to public safety. Parks and Wildlife Code, §43.151, authorizes the department to issue a depredation permit on the basis of public safety. The proposed new provision recapitulates the statutory provision for the sake of clarity.

Proposed new §65.221(d) would provide that lawful hunting activities may take place on a property for which a depredation permit has been issued. The proposed provision is necessary because the department does not wish to interfere with hunting activities on properties that sustain or provide recreational hunting opportunity and also are used for commercial agricultural, horticultural, or aquacultural purposes.

Proposed new §65.221(e) would create exceptions for the control of depredating cormorants and fur-bearing animals, which is provided for by other regulatory mechanisms. The proposed new provision is necessary to avoid duplicative rules.

Proposed new §65.221(f) would stipulate that nothing in the proposed new subchapter shall be construed to relieve any person of any other applicable requirement federal, state, or local law, including hunting license and hunter education requirements, which is necessary to clearly establish that the proposed new rules are not intended to replace, supplant, or negate any other laws, such as local ordinances governing the discharge of firearms.

Proposed new §65.221(g) would provide that the department will not issue a depredation permit for the killing of mule deer, pronghorn antelope, or desert bighorn sheep, except as provided in Parks and Wildlife Code, §43.152(b) and §43.154(a-1). Parks and Wildlife Code, §43.152(b) and §43.154(a-1) dictate special provisions regarding the killing of depredating mule deer, pronghorn antelope, or desert bighorn sheep. These provisions require, rather than merely authorize, the department to conduct an inspection of the property for which a permit is sought and make recommendations to the applicant for ways to minimize

the threat or damage. Also, the applicant must make a reasonable effort to comply with the department's recommendations. Rather than repeat the language of Parks and Wildlife Code, §43.152(b) and §43.154(a-1), the proposed rule merely references those sections.

Proposed new §65.221(h) would stipulate that the department may at any time require an applicant for a depredation permit or a person to whom a depredation permit has been issued to furnish evidence of commercial interest as defined in §65.220(4)(B) or (C). The provision is necessary to provide the department with a mechanism to verify a claim that serious economic damage is occurring.

Proposed new §65.222, concerning Application and Issuance, would prescribe requirements governing the application and issuance of depredation permits.

Proposed new §65.222(a) would require an applicant for a depredation permit to complete and submit an application on a form supplied by the department, accompanied by the fee specified elsewhere in the proposed new subchapter, which is necessary to establish an orderly and controlled mechanism for person to apply for a depredation permit. The proposed new §65.222(a)(1) would require applicants to furnish the name, Texas driver's license or identification number, and Social Security number, and physical address of each person for whom authorization is sought to conduct activities under a depredation permit. The proposed provision is necessary to establish the legal identity and whereabouts of prospective permittees and participants for purposes of law enforcement activities. Texas is required by federal law to obtain the Social Security number of any person to whom a license or permit is issued, for purposes of child-support enforcement. Proposed new §65.222(a)(2) and (a)(3) require the applicant to also provide evidence of commercial interest and evidence clearly showing serious damage, as defined in the subchapter.

Proposed new §65.222(b) would stipulate that by signing an application for a depredation permit, the applicant swears to the truth and accuracy of all information contained in the application. The proposed provision is necessary because Parks and Wildlife Code, §43.153, requires that an application for a depredation permit contain a sworn statement containing the facts relating to the damage or threat and an agreement to comply with the provisions of Parks and Wildlife Code, Chapter 43, Subchapter H and any rules adopted by the commission under that subchapter.

Proposed new §65.222(c) would stipulate that the department, upon a determination that measures other than depredation permit are warranted, may make recommendations concerning ways to minimize the damage or threat and will not issue a permit unless it is satisfied that the applicant has made a reasonable attempt to implement the recommendations. The proposed provision is necessary because the department views the issuance of a depredation permit as a remedy of last resort. If there are other management alternatives that would be effective, such as fencing, harassment, or hunting, the department believes that those alternatives should be pursued and a depredation permit issued only when those alternatives fail.

Proposed new §65.223, concerning Inspection, would provide that the department may inspect a property to determine if issuance of a depredation permit is warranted, and that the department may cancel a depredation permit if an inspection reveals that a permittee is not complying or has not complied with the provisions of the proposed new subchapter or the provisions of a depredation permit. The proposed new section is necessary to allow the department to verify, if necessary, that depredation is occurring on a prospective property or that a permittee is in fact complying with the provisions of a permit.

Proposed new §65.224, concerning Period of Validity, would set forth the conditions under which a depredation permit is valid.

Proposed new §65.224(a) would stipulate that a depredation is not valid unless the crop for which the permit is issued has been planted and is growing on the property for which the permit is issued. The proposed provision is necessary because H.B. 1965 authorizes the killing of wildlife only to protect commercial agricultural, horticultural, or aquacultural interests. It is therefore logical to conclude that a permit should not be valid unless the basis for permit issuance exists.

Proposed new §65.224(b) would stipulate that a depredation permit is not valid after a crop or product for which the permit has been issued has been harvested on the property for which the permit has been issued. The proposed provision is necessary because the statutory intent of both Parks and Wildlife Code and H.B. 1965 is to authorize the killing of wildlife only to protect commercial agricultural, horticultural, or aquacultural interests. It is therefore logical to conclude that a permit should not be valid unless the basis for permit issuance exists.

Proposed new §65.224(c) would stipulate that the department will authorize a period of validity for a depredation permit, when applicable or necessary, based on the planting dates and growing seasons for individual crops. The proposed provision is necessary because there is no reason for a depredation permit to be valid at times when the crop or product for which the permit is sought cannot be grown or is not viable.

Proposed new §65.224(d) would stipulate that the department will authorize the period of validity of a depredation permit issued because of a threat to public safety. The department has determined that because of the wide variety of possibilities related to issues of public safety, the department should prescribe the period of validity of permits issued on that basis on a case-by-case basis.

Proposed new §65.225, concerning Notification, would establish requirements for permittees to notify the department when permitted activities will be or have been conducted.

Proposed new §65.225(a) would require permittees to notify the department not more than 24 hours nor less than four hours prior to any activity authorized by the permit. The proposed provision is necessary to provide the department an opportunity to observe permitted activities and verify compliance.

Proposed new §65.225(b) would require permittees who do not provide prior notice of permitted activities to provide notice of permitted activities not later than two hours after wildlife is killed. The proposed provision is necessary to provide the department an opportunity to observe permitted activities and verify compliance in instances where permittees have an unplanned opportunity to conduct permitted activities and are unable to provide prior notice.

Proposed new §65.226, concerning Means and Methods, would set forth the manners in which wildlife authorized to be killed under a depredation permit may be killed. The intent of the department is to authorize only the most effective and efficient methods for killing wildlife under a depredation permit.

Proposed new §65.227, concerning Documentation, Reporting, and Recordkeeping, would prescribe the requirements for identifying wildlife killed under a depredation permit, reporting requirements related to permitted activities, and recordkeeping.

Proposed new §65.227(a) would require all wildlife killed under a depredation permit to be documented and/or tagged as set forth in the provisions of a permit. Because a depredation permit may be authorize the permittee to kill any wildlife protected by the Parks and Wildlife Code, the great variety of possible scenarios cannot be specifically addressed in the proposed regulations. For instance, a depredation permit could authorize the killing of thousands of squirrels, or a small number of javelina. Therefore, the proposed rules would allow the department to issue specific instructions for the labeling, tagging, or documentation of specific species in the provisions of the permit.

Proposed new §65.227(b) would require a permittee to maintain an accurate daily log of all activities conducted under a depredation permit and would specify the specific types of information that must be recorded in the daily log. The proposed provision would require the daily log to contain the number, species, sex, date, and disposition of all wildlife killed under a depredation permit, which is necessary in order for the department to be able to determine that the permittee is in compliance with the provisions of the permit. The proposed new subsection also would require that for permits authorizing the killing of deer, the daily log reflect whether the deer was antlered or antlerless, and if antlered, the number of points on each main beam. The proposed provision is necessary because the department intends to ensure that all deer killed are accounted for, especially buck deer. Antlers from buck deer are a commodity, and the department seeks to remove the opportunity for unscrupulous persons to engage in the sale or trafficking of antlers, which is specifically forbidden under the provisions of H.B. 1965.

Proposed new §65.227(c) would require permittees to submit a final report to the department within ten days of the expiration of a depredation permit. The proposed provision is necessary to ensure compliance with the proposed rules and with the provisions of H.B. 1965.

Proposed new §65.228, concerning Permit Cancellation, would allow the department to cancel a depredation permit if a permittee fails to conduct permitted activities, fails to timely submit required reports, fails to maintain the daily log, misrepresents information on an application, misrepresents information on a report or record, or violates a provision of a depredation permit or Parks and Wildlife Code, Chapter 43, Subchapter H. The proposed new section is necessary because Parks and Wildlife Code, Subchapter H, as amended by H.B. 1965, provides for the cancellation of a depredation permit if the permit does not accomplish its intended purposes, if the permit holder fails to submit a required report to the department or if the permit holder intentionally made false claims on the application for the permit. The department believes that it is necessary to provide additional detail regarding the reasons for which the department may cancel a permit.

Proposed new §65.229, concerning Permit Reinstatement, would allow for the reinstatement of a cancelled depredation permit upon a determination by the department that a cancelled depredation should be reinstated because of extenuating circumstances. The proposed new section is necessary because there may be instances in which a permittee is unable to accomplish permit activities due to circumstances beyond the permittee's control.

Proposed new §65.230, concerning Permit Denial, would provide that the department may deny permit issuance or participation in permitted activities to any person who within five years of applying for a depredation permit has been finally convicted of a violation of Parks and Wildlife Code, Chapter 43, Subchapter H; a violation of the conditions of a depredation permit; or a violation of Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or a felony. The proposed new section is necessary because the department believes that a person who has demonstrated a proven disregard for wildlife and conservation law should not be entrusted with a permit or be allowed to engage in permitted activities that allow the killing of wildlife out of season, and without regard to bag limits or lawful shooting hours.

Proposed new §65.231, concerning Fees, would establish a fee of $500 for an application for a depredation permit. The proposed new section is necessary because the department has determined, based on estimates of demand for the permit and anticipated commitment of agency law enforcement and biologist resources, that a fee of $500 is the minimum amount necessary to recoup the agency's costs to administer and enforce the proposed rules.

Proposed new §65.232, concerning Prohibited Acts, would for clarity's sake list specific acts that are a violation of the subchapter.

Proposed new §65.232(1) and (2) would clarify that it is an offense for any person not named on a depredation permit to participate in activities under a depredation permit and for any person to whom a depredation permit has been issued to allow any person not named on the permit to engage in permitted activities. It is logical that unpermitted persons should not engage in permitted activities, whether by their own volition or by the acquiescence of a permittee.

Proposed new §65.232(3) would clarify that it is an offense to kill game animals or game birds outside of lawful shooting hours or during a closed season on a property for which a depredation permit has been cancelled. The proposed new provision is necessary to make it absolutely clear that when a depredation permit is cancelled, all hunting laws of the state apply.

Proposed new §65.232(4) would make it an offense to offer or accept money or anything of value in exchange for participation in activities under a depredation permit, except for persons employed by a person to whom a depredation permit is issued. The proposed new provision is necessary to make clear that a depredation permit is not intended to allow a person to sell or trade permit privileges; however, an employee of the permittee who is named on a permit may engage in permitted activities as a consequence of employment.

Proposed new §65.232(5) would make it an offense to fail to immediately destroy the antlers or horns of a buck deer, antelope, or bighorn sheep killed by the person under a depredation permit. The proposed new provision is necessary because under Parks and Wildlife Code, §65.155, as amended by H.B. 1965, a permit holder or a person designated under Section 43.154(c)(4) may not keep or sell any part of the wildlife taken under this subchapter, including antlers.

Proposed new §65.233, concerning Penalties, would recapitulate the penalties prescribed for a violation of the subchapter or a permit by Parks and Wildlife Code, Chapter 43, Subchapter. The proposed new rule is necessary for the sake of easy reference.

Mr. Clayton Wolf, Big Game Program Director, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local government as a result of enforcement or administration of the rules. The department is proposing a fee for the depredation permit that should result in no fiscal impact to the department.

Mr. Wolf also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection of commercial agricultural, horticultural, and aquacultural interests from serious damage as a result of depredation by wildlife protected by the Parks and Wildlife Code and the protection of public safety.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that when the purpose and intent of the proposal is considered as a whole, there will not be a direct adverse economic effect on small or micro-businesses or persons required to comply as a result of the proposed rules. As explained below, the costs to the persons required to comply with the proposal would be outweighed by the financial benefits of the activities authorized by the proposal.

Although the rules as proposed would impose fees and reporting and recordkeeping requirements, they would not necessarily require the purchase of additional professional expertise. Similarly, the rules as proposed would not necessarily impose or require additional capital costs or costs for modification of existing processes or procedures, lead to loss of sales or profits, or change market competition.

With regard to the application fee established by the proposed rules, Parks and Wildlife Code §43.153(d), as amended by H.B. 1965, established a permit fee of $50, or a fee set by the commission, whichever is higher. Also, Parks and Wildlife Code §11.027(b) authorizes the department to establish fees to cover costs associated with the review of applications for permits authorized by the Parks and Wildlife Code. As explained below, the application fee of $500 was calculated by considering the department staff time required to process and issue depredation permits and is proposed at an amount that is estimated by cover the department's costs.

With regard to the recordkeeping requirements, Parks and Wildlife Code Chapter 43, Subchapter H, as amended by H.B. 1965, authorizes the department to adopt rules regarding permit applications and reports to be submitted by persons holding or seeking depredation permits.

However, since the proposed rules are intended to provide a tool to reduce or eliminate economic losses from damage to commercial crops and products, the rules as proposed should result in a net economic benefit for small and microbusinesses.

The department has learned that certain protected wildlife have been causing significant damage to commercial crops in the state, resulting in economic injury to individuals engaged in commercial agricultural, horticultural, or aquacultural activities. The application fee and recordkeeping requirements imposed by the proposed new rules are insignificant when compared to the loss to commercial agricultural, horticultural, or aquacultural caused by depredating wildlife. Other mechanisms for addressing such damage, such as fencing, are significantly more costly than the proposed application fee and recordkeeping requirements. Therefore, any costs imposed by the rules as proposed would be outweighed by the economic benefits realized by permittees in the reduction of losses to commercial agricultural, horticultural, or aquacultural interests.

Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006 for depredation permits issued to address damage caused by protected wildlife to commercial agriculture, horticulture, or aquaculture.

Parks and Wildlife Code, Chapter 43, Subchapter H, also provides for issuance of a depredation permit in instances in which wildlife protected by the Parks and Wildlife Code are a threat to public safety. Currently, the primary entities to which the department issues depredation permits for the protection of public safety are airports. Some of these permittees may quality as small or micro-businesses. In the Fiscal Year 2008, the last complete fiscal year for which the department has records, the department issued 12 depredation permits to airports for the protection of public safety. As a result, 12 potential small or micro-businesses would be impacted by the proposed rules. The primary economic impact to such businesses would be the increase in the depredation permit fee from $0 to $500. Also, the proposed rules impose additional reporting and recordkeeping requirements. Therefore, the economic impact would be $500, plus administrative costs associated with the additional recordkeeping and reporting. The department considered alternatives such as reducing the fee for entities seeking permits issued to address public safety or modifying the period of validity for depredation permits issued to address public safety or. In an effort to reduce the potential adverse economic impact on small or micro-businesses seeking a permit to address public safety, the department included in the proposal new §65.224(d) which enables the department to specify the period of validity for a depredation permit issued to address wildlife that pose a threat to public safety. This will enable the department to issue depredation permits to address public safety for a longer period, which will result in an overall reduction in the cost of compliance for small or micro-businesses. The rules will affect persons required to comply as described above.

The $500 fee for a depredation permit application imposed by proposed new §65.231 was determined as follows. The department estimates that each application will require an average of one hour of administrative time, 30 minutes of a Wildlife Division District Leader's time, and one hour of the White-tailed Deer Program Leader's time. In addition, the department estimates that 5% of the applications will require 12 hours of a biologist's time to conduct an inspection. Of the remaining 95%, the department estimates that 80% will require four hours of a biologist's time to conduct an inspection and 20% will not require an inspection as a result of familiarity with the property. In other words, of the applications received, 5% will require a 12-hour inspection, 76% will require a four-hour inspection and 19% will require no inspection. The department also estimates that the department's law enforcement communications dispatchers will receive an average of 12 calls per permittee and will spend an average of 30 minutes on each call. Also, the department estimates that game wardens will average three spot-checks a year per permit and will spend an average of two hours on each spot-check. Using salary information, the department estimates that the cost to the department in staff time, not including overhead, supplies, or benefits would be around $485. This amount was rounded up to $500 to address, in part, overhead, supplies and benefits.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

The new rules are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter H, as amended by House Bill 1965, 81st Texas Legislature (Regular Session) which authorized the department to adopt rules to implement. The new rules are also proposed under Parks and Wildlife Code §11.027(b) which authorizes the department to establish fees to cover costs associated with the review of applications for permits authorized by the Park and Wildlife Code.

The proposed new rules affect Parks and Wildlife Code, Chapter 43, Subchapter H, and Chapter 11, §11.027.

§65.220. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Appropriate recipient--A person or public or private organization that utilizes the donated wildlife for the public good and not for pecuniary gain.

(2) Evidence of commercial interest--Documentation required by the department to demonstrate that the applicant has a commercial interest in agriculture, horticulture, or aquaculture.

(A) The department shall require the attestation of the applicant on the application that agricultural, horticultural, or aquacultural crops or products raised or grown on a property for which a depredation permit is sought are:

(i) sold or exchanged for cash or anything of value; or

(ii) used to feed livestock, exotic livestock, or aquacultural stock that are sold or exchanged for cash or anything of value; or

(B) In addition to the attestation required by subparagraph (A) of this paragraph, the department may require additional information, such as sales receipts, tax receipts, or other documentation acceptable to the department indicating that agricultural, horticultural, or aquacultural crops or products raised or grown on a property for which a depredation permit is sought are:

(i) sold or exchanged for cash or anything of value; and/or

(ii) used to feed livestock, exotic livestock, or aquacultural stock that are sold or exchanged for cash or anything of value.

(3) Depredation permit--A permit issued under the provisions of this subchapter.

(4) Evidence clearly showing serious damage--Documentation required by the department to demonstrate that protected wildlife is causing serious damage. The department may require one or all of the following as evidence clearly showing serious damage:

(A) the attestation of an applicant for a depredation permit that wildlife protected by the Parks and Wildlife Code is causing serious damage to commercial agricultural, horticultural, or aquacultural crops or products;

(B) recent or current photographs or video of commercial agricultural, horticultural, or aquacultural crops or products demonstrating serious damage caused by wildlife protected by the Parks and Wildlife Code; or

(C) an affidavit supplied by an agent of Texas AgriLIFE Extension Service attesting to the fact that wildlife protected by the Parks and Wildlife Code is causing serious damage to commercial agricultural, horticultural, or aquacultural crops or products.

(5) Destruction of antlers or horns--To saw, cut, or chop completely through each main beam of antler or horn at a point within two inches of the skull, and at the approximate midpoint between the base and tip of each main beam or horn.

(6) Protected wildlife--Wildlife protected by the Parks and Wildlife Code.

§65.221. General Provisions.

(a) Activities authorized under a depredation permit shall be conducted only by persons named on the permit.

(b) A depredation permit authorizes the killing of protected wildlife identified on the permit at any time during the period of validity of the permit, irrespective of open seasons and lawful shooting hours.

(c) A depredation permit may be issued at any time upon a finding by the department that protected wildlife presents a threat to public safety.

(d) Lawful hunting activities may take place on a property for which a depredation permit has been issued.

(e) The department will not issue a permit under this subchapter to control cormorants or fur-bearing animals. Cormorant control permits are governed by the provisions of §65.901 of this title (relating to Cormorant Control Permit), and nuisance fur-bearing animals are addressed by Subchapter Q of this chapter (relating to Statewide Fur-bearing Animal Proclamation).

(f) Nothing in this subchapter shall be construed to relieve any person of any other applicable requirements of federal, state, or local law, including laws prescribing hunting license and hunter education requirements.

(g) Notwithstanding other provisions of this subchapter, the department will not issue a permit under this subchapter for the killing of mule deer, pronghorn antelope, or desert bighorn sheep, except as provided in Parks and Wildlife Code, §43.152(b) and §43.154(a-1).

(h) The department may at any time require an applicant for a depredation permit or a person to whom a depredation permit has been issued to furnish evidence clearly showing serious damage as defined in §65.220(4)(B) and (C) of this title (relating to Definitions).

§65.222. Application and Issuance.

(a) An applicant for a depredation permit shall complete and submit to the department an application on a form supplied by the department, accompanied by the fee stipulated in §65.231 of this title (relating to Fees). The applicant shall furnish the information required by Parks and Wildlife Code, §43.153, including but not limited to:

(1) the name, Texas driver's license or personal identification number, Social Security number, and physical address of each person for whom authorization is sought to conduct activities authorized under the depredation permit;

(2) evidence of commercial interest as defined in this subchapter; and

(3) evidence clearly showing serious damage, as defined in this subchapter.

(b) By signing the application, the applicant swears to the truth and accuracy of all information contained in the application, including the attestation that serious damage is occurring to a commercial agricultural, horticultural, or aquacultural crop or product.

(c) If the department determines that measures other than a depredation permit are warranted, it shall make recommendations concerning ways to minimize the damage or threat caused by wildlife. The department will not issue a depredation permit if it is not satisfied that the applicant has made a reasonable attempt to implement the recommendations.

§65.223. Inspection.

(a) The department may inspect any property to determine if permit issuance is warranted and may refuse to issue a depredation permit on the basis of an inspection.

(b) The department may inspect any property to determine compliance with the provisions of a depredation permit and may cancel a depredation permit if an inspection reveals that a permittee is not complying or has not complied with this subchapter or the provisions of a depredation permit.

§65.224. Period of Validity.

(a) A depredation permit is not valid unless the crop or product for which the permit is issued has been planted and is growing on the property for which the permit is issued.

(b) A depredation permit is not valid after the crop for which the permit is issued has been harvested on the property for which the permit is issued.

(c) The period of validity of a depredation permit, when applicable or necessary, may be determined by the planting dates and growing seasons for individual crops or products.

(d) The department shall specify the period of validity for a depredation permit issued because of a threat to public safety.

§65.225. Notification.

(a) Except as provided in subsection (b) of this section, a permittee under this subchapter shall notify the department by calling the notification number provided on the permit not more than 24 hours nor less than four hours prior to any authorized activity.

(b) A permittee who does not notify the department as provided in subsection (a) of this section shall notify the department by calling the notification number provided on the permit not more than two hours following any unscheduled killing of wildlife under a depredation permit.

§65.226. Means and Methods.

(a) Centerfire firearms are the only lawful means for killing deer, antelope, javelina, or desert bighorn sheep under a depredation permit.

(b) Centerfire firearms, rimfire firearms, and shotguns are the only lawful means for killing non-migratory game birds and squirrels under a depredation permit.

(c) Depredating nongame wildlife and alligators may be taken by any lawful means under a depredation permit.

(d) The department may authorize the live capture and humane dispatch of wildlife other than deer, antelope, javelina, bighorn sheep, and non-migratory game birds.

§65.227. Documentation, Reporting, and Recordkeeping.

(a) All wildlife killed under a depredation permit shall be documented and/or tagged as set forth in the permit provisions.

(b) A person conducting activities under a depredation permit shall maintain an accurate daily log of all activities conducted under a depredation permit. The daily log shall be made available at the request of any department employee acting within the scope of official duties, and shall indicate, at a minimum:

(1) the number of wildlife killed by each person named on the permit;

(2) the sex of the wildlife killed by each person named on the permit;

(3) if the animal is a deer, whether the deer was antlered or antlerless, and if the deer was antlered, the number of antler points on each main beam;

(4) the date that each animal or bird was killed; and

(5) the disposition of the wildlife, to include the name of the person or organization receiving the donated wildlife.

(c) A person to whom a depredation permit has been issued shall submit a final report, including the daily log required by subsection (b) of this section, to the department's Austin headquarters, on a form supplied by the department, within 10 days of the expiration of the period of validity of the permit.

§65.228. Permit Cancellation.

The department may cancel a depredation permit at any time upon determining that the permittee:

(1) has failed to conduct the activities authorized by a depredation permit;

(2) has failed to maintain the daily log required by §65.227(b) of this title (relating to Documentation, Reporting, and Recordkeeping);

(3) has failed to timely submit any required report;

(4) has misrepresented any information required on the application for a depredation permit;

(5) has misrepresented any information on a report or record required by this subchapter; or

(6) has violated a provision of Parks and Wildlife Code, Chapter 43, Subchapter H, or a depredation permit.

§65.229. Permit Reinstatement.

A permit that has been cancelled may be reinstated by the department upon a determination that extenuating circumstances warrant reinstatement.

§65.230. Permit Denial.

(a) The department may refuse to issue a depredation permit to any person who within five years of applying for a depredation permit has been finally convicted of:

(1) a violation of Parks and Wildlife Code, Chapter 43, Subchapter H;

(2) a violation of the conditions of a depredation permit; or

(3) a violation of Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or a felony.

(b) The department may prohibit a person from participating in activities under a depredation permit if the person has been convicted of a violation listed in subsection (a) of this section within the previous five years.

§65.231. Fees.

The application fee for a depredation permit shall be $500. The fee prescribed by this section is nonrefundable.

§65.232. Prohibited Acts.

It is an offense for any person:

(1) not named on a depredation permit to kill protected wildlife under the depredation permit;

(2) to whom a depredation permit is issued to allow any person not named on the depredation permit to engage in permitted activities;

(3) to kill game animals or game birds outside of lawful shooting hours or during a closed season on a property for which a depredation permit has been cancelled;

(4) to offer or accept money or anything of value in exchange for participation in activities under a depredation permit, except for persons employed by a person to whom a depredation permit is issued; or

(5) to fail to immediately destroy the antlers or horns of a buck deer, antelope, or bighorn sheep killed by the person under a depredation permit. Antlers and horns destroyed under this paragraph shall be discarded as waste.

§65.233. Penalties.

The penalties for a violation of this subchapter or the provisions of a depredation permit are prescribed by Parks and Wildlife Code, Chapter 43, Subchapter H.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902842
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 389-4775

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SUBCHAPTER K. RAPTOR PROCLAMATION

31 TAC §65.261

The Texas Parks and Wildlife Department proposes an amendment to §65.261, concerning Applicability. The proposed amendment would adopt federal falconry regulations by reference and clarify that the federal regulations control in instances where the department's rules conflict by being less restrictive than the federal regulations.

The practice of falconry is regulated at both the state and federal levels. The federal authority to regulate falconry is derived from the Migratory Bird Treaty Act, 16 U.S.C. §703 et seq. The Migratory Bird Treaty Act authorizes the states to adopt rules that are more restrictive than the federal rules, but not less restrictive, 16 U.S.C. §708.

Under current state rules and federal regulations, an applicant for a state falconry permit must apply for a federal falconry permit concurrently with the application for a state permit. The U.S. Fish and Wildlife Service (Service) has recently conducted a significant revision of federal falconry regulations. Part of that revision allows states that meet the federal falconry standards to handle falconry permitting with a single state permit application. In those states, the state becomes, in effect, an administrative agent of the Service. In states that do not participate in joint federal/state falconry certification, applicants must continue to apply for state and federal falconry permits separately. Texas falconers have expressed a strong desire to be administratively regulated by the department alone.

As a consequence of the new federal falconry regulations, the Texas falconry rules are at variance with the federal regulations in some instances. Federal regulations require federal certification of state rules by September 1, 2009 if the state is to take advantage of the joint permitting program. The proposed amendment would make a provisional alteration necessary to temporarily eliminate conflicts between state rules and federal falconry regulations, which will allow for the certification of the state program by the Service. Meanwhile, the department is currently involved with the regulated community to develop new state falconry regulations, which should be ready within the year.

Mr. Robert Macdonald, Regulations Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcement or administration of the rule.

Mr. Macdonald also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the reduction of administrative complexity for Texas falconers by creating a single administrative process for licensure at the state level.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rules. The rule would not compel or mandate any action on the part of any entity, including small businesses or microbusinesses. In particular, the proposed rule would not add new reporting or recordkeeping requirements; require any new professional expertise, capital costs, or costs for modification of existing processes or procedures; lead to loss of sales or profits; change market competition; or increase taxes or fees. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

The amendment is proposed under Parks and Wildlife Code, Chapter 49, which authorizes the department to prescribe rules for the taking, capture, possession, propagation, transportation, export, import, and sale of raptors, the times and areas from which raptors may be taken or captured, and species that may be taken or captured; provide standards for possessing and housing raptors held under a permit; prescribe annual reporting requirements and procedures; prescribe eligibility requirements and fees for and issue any falconry, raptor propagation, or nonresident trapping permit; and require and regulate the identification of raptors held by permit holders.

The proposed rule affects Parks and Wildlife Code, Chapter 49.

§65.261. Applicability.

(a) This subchapter applies to all raptors indigenous to state of Texas.

(b) The department adopts by reference the federal falconry regulations contained in 50 Code of Federal Regulations (CFR) Parts 21 and 22.

(c) If any provisions of this subchapter are less restrictive than any provision of federal falconry regulations contained in 50 CFR Parts 21 or 22, the federal regulations control.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902841
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 23, 2009
For further information, please call: (512) 389-4775

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.723

The Texas Health and Human Services Commission withdraws the proposed amendment to §355.723 which appeared in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2732).

Filed with the Office of the Secretary of State on July 13, 2009.

TRD-200902843
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: July 13, 2009
For further information, please call: (512) 424-6900

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.307

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.307, Reimbursement Setting Methodology, under Title 1 of the Texas Administrative Code (TAC), Part 15, Chapter 355, Subchapter C. The proposed rule is adopted with changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 919). The text of the rule will be republished.

Background and Justification

This rule establishes the reimbursement methodology for the Nursing Facility (NF) program, including Medicaid reimbursement rates for pediatric care facilities. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule to allow a limited number of adults who were admitted to the facility as children but who are now over the age of 22 (i.e., individuals who have "aged in place") to be counted as children for purposes of determining if a facility meets the requirements for remaining a pediatric care facility.

This change applies only when the pediatric care facility is the entire facility; it does not apply to pediatric care facilities that are distinct units within a larger facility. In addition, the change applies only to determining if an already existing pediatric care facility continues to meet the pediatric care facility census requirements. It does not apply to determining if a non-pediatric care facility meets the requirements to become a pediatric care facility.

In this specific instance, the proposal amends current rule language that requires a pediatric care facility to maintain an average daily census of 80 percent children, as defined in this rule. The proposed amendment would allow a limited number of aging-in-place adults to be counted as children for the limited purpose of determining whether the facility continues to meet the pediatric care facility 80 percent census requirement. Under the proposed amendment, a pediatric care facility could, for purposes of the 80 percent census requirement, count as "children" aging-in-place adults up to 15 percent of the facility's average daily census. The census count, therefore, would include the actual number of children plus aging-in-place adults up to 15 percent of the facility's average daily census.

Examples of facilities that would qualify as pediatric care facilities under the rule include the following:

Facility A - A facility with an average daily census of 100 where 80 percent or more of the residents are children;

Facility B - A facility with an average daily census of 100 where 70 percent of the residents are children and 10 percent of the residents are aging-in-place adults.

Examples of facilities that would not qualify as pediatric care facilities include:

Facility C - A facility with an average daily census of 100 where less than 80 percent of the residents are children and none of the residents are aging-in-place adults.

Facility D - A facility with an average daily census of 100 where 60 percent of the residents are children and 20 percent of the residents are aging-in-place adults.

Facility D would not qualify as a pediatric care facility under the rule because, to meet the 80 percent requirement, it would have to include more than 15 percent of its census as aging-in-place adults.

Facilities with an average daily census of less than 80 percent children and no aging-in-place adults and facilities that require more than 15 percent of their average daily census to be aging-in-place adults in order to meet the 80 percent requirement will no longer qualify as pediatric care facilities. At that point, the facility will have to create a pediatric care distinct unit if it wishes to continue receiving the pediatric reimbursement rate for its residents who are children. The adopted rule includes new subsection (c)(4), which describes the procedures to be followed when HHSC identifies an existing pediatric care facility that has an average daily census of less than 80 percent children.

Comments

The 30-day comment period ended March 13, 2009. During this period, HHSC received comments regarding the proposed amendment to §355.307 from representatives of the one provider that currently operates a pediatric care facility. A summary of the comments relating to the proposed rule and HHSC's responses follow:

Comment concerning §355.307(c)(2)(C). The commenter recommended that the limit on the number of adults that have "aged in place" and that could be counted to meet the pediatric care facility child census requirement be eliminated.

Response: HHSC calculates facility-specific rates for pediatric care facilities based on each facility's actual costs for providing care. HHSC believes that the requirement that a substantial number of individuals residing in a pediatric care facility be children is reasonable given the cost differences between nursing facilities that serve a predominantly pediatric population and

nursing facilities that serve a predominantly geriatric population. HHSC did not change the proposed rule in response to this comment.

Comment concerning §355.307(c)(3). The commenter proposed language to delineate the processes by which: (1) HHSC would notify a facility that it was not in compliance with the pediatric care facility census requirement; and (2) a facility would come into compliance with the census requirement or transition to a new facility payment class.

Response: In response to this comment, HHSC has added paragraph (4) to §355.307(c). This new paragraph explains that HHSC will notify a facility that it is not in compliance with the pediatric care facility census requirement. The notice also will explain that the facility must either come into compliance with the requirement or transition to a new facility payment class.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

§355.307. Reimbursement Setting Methodology.

(a) Case mix classes. The Texas Health and Human Services Commission (HHSC) reimbursement rates for nursing facilities (NFs) vary according to the assessed characteristics of the recipient. Rates are determined for 34 case mix classes of service, plus a 35th, temporary classification assigned by default when assessment data are incomplete or in error and a 36th classification assigned by default when an assessment is missing.

(b) Reimbursement determination. HHSC applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Rate Components. Under the case mix methodology, reimbursements are comprised of five cost-related components: the direct care staff component; the other recipient care component; the dietary component; the general/administration component; and the fixed capital asset component. The direct care staff component is calculated as specified in §355.308 of this title (relating to Direct Care Staff Rate Component).

(A) The dietary rate component is constant across all case mix classes and is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(B) The general/administration rate component is constant across all case mix classes and is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(C) The fixed capital asset component is constant across all case mix classes and is calculated as follows:

(i) Determine the 80th percentile in the array of allowable appraised property values per licensed bed, including land and improvements. Appraised values for this purpose are determined as follows:

(I) For proprietary facilities, tax exempt facilities provided an appraisal from their local property taxing authority, and tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is in the first year of its five-year interval as described in §355.306(g)(2)(B)(ii) of this title (relating to Cost Finding Methodology), allowable appraised values are determined as described in §355.306(g) of this title (relating to Cost Finding Methodology).

(II) For tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is not in the first year of its five-year interval as described in §355.306(g)(2)(B)(ii) of this title (relating to Cost Finding Methodology), allowable appraised values are determined by indexing the facility's allowable appraised value as determined in §355.306(g) of this title (relating to Cost Finding Methodology) to the median increase in appraised values among contracted facilities in the state as a whole from the reporting period coinciding with the first year of the facility's five-year interval to the reporting period upon which reimbursements are to be based.

(III) Those facilities that do not report an allowable appraised value as described in §355.306(g) of this title (relating to Cost Finding Methodology) are not included in the array for purposes of calculating the use fee.

(ii) Project the 80th percentile of appraised property values per bed by one-half the forecasted increase in the personal consumption expenditures (PCE) chain-type price index from the cost reporting year to the rate year.

(iii) Calculate an annual use fee per bed as the projected 80th percentile of appraised property values per bed times an annual use rate of 14%.

(iv) Calculate a per diem use fee per bed by dividing the annual use fee per bed by annual days of service per bed at the higher of 85% occupancy, or the statewide average occupancy rate during the cost reporting period.

(v) The use fee is limited to the lesser of the fee as calculated in clauses (i) - (iv) of this subparagraph, or the fee as calculated by inflating the fee from the previous rate period by the forecasted rate of change in the PCE chain-type price index.

(2) Case mix classification system. All Medicaid recipients are classified according to the Resource Utilization Group (RUG-III) 34 group classification system, Version 5.20, index maximizing, as established by the state and the Centers for Medicare and Medicaid Services (CMS). Each of the case-mix groups, including the default groups, is assigned CMS standard nursing time measurements for Registered Nurses (RNs), Licensed Vocational Nurses (LVNs) and aides (Medication Aides and Certified Nurse Aides). These measurements indicate the amount of staff time required on average to deliver care to residents in that group.

(3) Per diem rate methodology. Staff determine per diem rate recommendations for each of the RUG-III groups and for the default groups according to the following procedures:

(A) For each RUG-III group, calculate a total LVN-equivalent minute statistic by converting the CMS standard nursing time measurements for RNs, LVNs and aides into Texas-specific LVN-equivalent minutes as per §355.308(j) of this title (relating to Direct Care Staff Rate Component) and summing the converted figures.

(B) Weight the total LVN-equivalent minute statistics from subparagraph (A) of this paragraph for each RUG-III group ex-

cept the default groups as follows and determine the statewide weighted average total adjusted minutes:

(i) For rates effective September 1, 2008, the total LVN-equivalent minute statistics for each RUG-III group will be weighted by the estimated statewide recipient days of service by case mix group during the period beginning the first day of December 2007 and ending the last day of February 2008.

(ii) For rates effective September 1, 2009, the total LVN-equivalent minute statistics for each RUG-III group will be weighted by the estimated statewide recipient days of service by case mix group during the period beginning the first day of September 2008 and ending the last day of February 2009.

(iii) For rates effective September 1, 2011 and thereafter, for the other recipient care rate component, the total LVN-equivalent minute statistics for each RUG-III group will be weighted by the estimated statewide recipient days of service by case mix group during the cost reporting period covered by the rate base. For the direct care rate component, the total LVN-equivalent minute statistics for each RUG-III group will be weighted by the estimated statewide recipient days of service by case mix group during the period beginning the first day of September, 2008 and ending the last day of February, 2009.

(C) Determine the standardized statewide case mix index for each of the RUG-III groups by dividing each of the total LVN-equivalent minute statistics described under subparagraph (A) of this paragraph by the statewide weighted average total adjusted minutes described under subparagraph (B) of this paragraph.

(D) The other recipient care rate component varies according to case mix class of service and is calculated as follows. Adjust the raw sum of other recipient care costs in all nursing facilities included in the rate base in order to account for disallowed costs and inflation, as specified in §355.306 of this title (relating to Cost Finding Methodology). Then divide the adjusted total by the sum of recipient days of service in all facilities in the current rate base. Multiply the resulting weighted, average per diem cost of other recipient care by 1.07. The result is the average other recipient care rate component. To calculate the other recipient care per diem rate component for each of the RUG-III case mix groups and for the default groups, multiply each of the standardized statewide case mix indexes from subparagraph (C) of this paragraph by the average other recipient care rate component.

(E) Total case mix per diem rates vary according to case mix class of service and according to participant status in Direct Care Staff Rate enhancements described in §355.308 of this title (relating to Direct Care Staff Rate Component).

(i) For each participating facility, for each of the RUG-III case mix groups and for the default groups, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (D) of this paragraph; and

(V) the case mix group's total direct care staff rate component for that participating facility as determined in §355.308(l) of this title (relating to Direct Care Staff Rate Component).

(ii) For nonparticipating facilities, for each of the RUG-III case mix groups and for the default groups, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (D) of this paragraph; and

(V) the case mix group's total direct care staff base rate component as determined in §355.308(k) of this title (relating to Direct Care Staff Rate Component).

(F) Qualifying ventilator-dependent residents may receive a supplement to the per diem rate specified in subparagraph (E) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must require artificial ventilation for at least six consecutive hours daily and the use must be prescribed by a licensed physician.

(ii) A ventilator-dependent resource differential case mix index for the other recipient care rate component is calculated by subtracting the standardized statewide case mix index for the SE1 RUG-III case mix group from subparagraph (C) of this paragraph from 3.61. A ventilator-dependent resource differential case mix index for the direct care staff base rate component is calculated by dividing the resource differential case mix index for the other recipient care rate component by 0.9908.

(iii) The per diem rate supplement is calculated by multiplying the resource differential case mix index for the other recipient care rate component times the per diem average other recipient care rate component, as described in subparagraph (D) of this paragraph and multiplying the resource differential case mix index for the direct care staff base rate component by the average direct care staff base rate component as described in §355.308(k) of this title (relating to Direct Care Staff Rate) and summing the products.

(iv) The supplemental reimbursement for residents requiring continuous artificial ventilation is 100% of the per diem ventilator rate supplement.

(v) The supplemental reimbursement for residents not requiring continuous artificial ventilation daily but requiring artificial ventilation for at least six consecutive hours daily is 40% of the per diem ventilator rate supplement.

(G) Qualifying children with tracheostomies requiring daily care may receive a supplement to the per diem rate specified in subparagraph (E) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must be less than 22 years of age; require daily cleansing, dressing, and suctioning of a tracheostomy; and be unable to do self care. The daily care of the tracheostomy must be prescribed by a licensed physician.

(ii) The supplemental reimbursement for children receiving daily tracheostomy care is 60% of the per diem ventilator rate supplement as specified in subparagraph (F) of this paragraph.

(H) Children with qualifying conditions as specified in subparagraphs (F) and (G) of this paragraph may receive only one

of the supplemental reimbursements. Therefore, children with tracheostomies who are also ventilator-dependent are not eligible to receive both supplemental reimbursements.

(c) Special reimbursement class. HHSC may define special reimbursement classes, including experimental reimbursement classes of service to be used in research and demonstration projects on new reimbursement methods and reimbursement classes of service, to address the cost differences of a select group of recipients. Special classes may be implemented on a statewide basis, may be limited to a specific region of the state, or may be limited to a selected group of providers.

(1) Pediatric Care Facility Class. The purpose of this special class is to recognize, through the adoption of a facility-specific payment rate, the cost differences that exist in a nursing facility or distinct unit of a nursing facility that serves predominantly children.

(2) Definitions.

(A) Pediatric care facility--Except as provided for in subparagraph (C) of this paragraph, a pediatric care facility is an entire facility that has maintained an average daily census of 80% or more children for the six-month period prior to its entry into the pediatric care facility class based on the entire licensed facility. A pediatric care facility can also be a distinct unit of a facility that has maintained an average daily census of 85% or more children for the six-month period prior to its entry into the pediatric care facility class based on the distinct unit of the facility. To remain a pediatric care facility, the pediatric care facility must maintain an average daily census of 80% or more children if the pediatric care facility is an entire facility and 85% or more children if the pediatric care facility is a distinct unit of the facility. The contracted provider must request in writing by certified mail or by special mail delivery where the delivery can be verified to become a member of the pediatric care facility special reimbursement class. The request must be sent to the Texas Health and Human Services Commission.

(B) Distinct unit--A portion of a nursing facility that is physically separate from (beds are not commingled with) other units of the facility. The distinct unit can be an entire wing, a separate building, an entire floor, or an entire hallway. The distinct unit consists of all beds within the designated area. A distinct unit must consist of 28 or more Medicaid-contracted beds.

(C) Children--For the purposes of this pediatric care facility class, children are defined as being at or below 22 years of age.

(i) Only for a pediatric care facility that is designated in its entirety as a pediatric care facility, a limited number of adults who were admitted to the facility as children but who are no longer children (i.e., individuals who have "aged in place") may be counted as children for purposes of determining if the facility meets the requirements for remaining a pediatric care facility described in subparagraph (A) of this paragraph. The number of such individuals who may be counted as children for purposes of determining if the facility continues to meet the requirements for remaining a pediatric care facility is limited to 15% of the average daily census of the facility.

(ii) Individuals who have "aged in place" as described in clause (i) of this subparagraph may not be counted toward meeting the requirements for a facility to initially become a pediatric care facility nor can they be counted toward meeting the requirements for a distinct unit to remain a pediatric care facility.

(3) Payment rate determination. Payment rates will be determined in the following manner:

(A) Cost reports and payment rate determination for pediatric care facilities are governed by the requirements specified in Subchapter A of this chapter (relating to Cost Determination Process) except that payment rates are determined annually, coincident with the state's fiscal year, within available funds. A nursing facility that contains a pediatric care facility distinct unit must complete two cost reports: one report for the pediatric care facility distinct unit and one report for the remainder of the facility.

(B) Payment rates for this class of service will be determined on a facility-specific basis for the pediatric care facility. The total allowable costs from the most recent cost report deemed acceptable are adjusted for inflation from the cost report period to the rate period. The adjusted cost is divided by the greater of total patient days of service reported on the cost report or the days of service at 85% of contracted capacity of the pediatric care facility. The resulting cost per day is multiplied by a factor of 1.03 to determine the final facility-specific rate. If no acceptable cost report is available, the provider will be required to submit a cost report covering the time period specified by HHSC.

(C) The facility-specific payment rate from paragraph (3)(B) of this subsection will be paid for all Medicaid residents of a qualifying pediatric care facility regardless of the RUG level of the resident.

(D) Residents of the pediatric care facility will not be eligible to receive the ventilator-dependent or the children-with-tracheostomies supplemental reimbursements.

(E) Pediatric care facilities are not eligible to participate in §355.308 of this title (relating to Enhanced Direct Care Staff Rate).

(4) If HHSC determines that a pediatric care facility that is designated in its entirety as a pediatric care facility no longer qualifies as a member of such class according to paragraph (2) of this subsection, HHSC will notify the facility in writing.

(A) Within 30 calendar days of the date on the written notification, HHSC Rate Analysis must receive a written compliance plan from the facility as described in subparagraph (B) of this paragraph. If the 30th calendar day is a weekend day, national holiday, or state holiday, the first business day following the 30th calendar day is the final day receipt of the plan will be accepted.

(B) The compliance plan must indicate the facility's intent to, within 180 calendar days of the date of HHSC's initial written notification to the facility, come into compliance with paragraph (2) of this subsection by:

(i) Managing a sufficient number of admissions and discharges to come into compliance with the requirements of paragraphs (2)(A) and (2)(C) of this subsection to remain a member of the pediatric care facility special reimbursement class;

(ii) Creating a distinct unit of the facility as described under paragraph (2)(B) of this subsection; or

(iii) Withdrawing the entire facility from the pediatric care facility special class.

(C) HHSC will make a written determination regarding approval or disapproval of the compliance plan. A facility that submits a compliance plan that is subsequently disapproved will cease being reimbursed as a member of the pediatric facility special class on the first day of the month following HHSC's disapproval of the compliance plan.

(D) A compliance plan that is not received by the stated deadline will not be accepted, and the facility will be removed from the pediatric care facility special reimbursement class retroactive to

the first day of the month following the date of HHSC's initial written notification to the facility.

(E) A facility that obtains approval of its compliance plan from HHSC Rate Analysis will continue to be reimbursed as a member of the pediatric care special class until 180 calendar days of the date of HHSC's initial written notification to the facility. If by that time the facility has not achieved the stated goal of its compliance plan, the facility will be removed from the pediatric care special class effective the first day of the following month.

(F) If, at any time, HHSC determines that a facility that has come into compliance with paragraph (2) of this subsection by managing a sufficient number of admissions and discharges, as described in subparagraph (B)(i) of this paragraph, no longer qualifies as a member of such class, that facility will be excluded from the pediatric care special class for 365 days from the date HHSC makes its determination. The facility may apply to rejoin the class on the 366th day.

(G) A facility that is removed from or withdraws from the pediatric care special class will be considered a new facility, as described in §355.308(e) of this title for purposes of enrollment in the Nursing Facility Direct Care Staff Rate enhancement.

(H) A facility that is removed or withdraws from the pediatric care special class may not re-enter the class within one year of its removal or withdrawal.

(d) Nurse aide training and competency evaluation costs.

(1) DADS reimburses nursing facilities for the actual costs of training and testing nurse aides as required under the Omnibus Budget Reconciliation Act of 1987 (OBRA '87). Payments are based on cost reimbursement vouchers that are to be submitted quarterly. Allowable costs are limited to those costs incurred for training provided after October 1, 1990, for:

(A) actual training course expenses up to a set amount determined by DADS per nurse aide;

(B) competency evaluation; or

(C) supplies and materials used in the nurse aide training not already covered by the training course fee.

(2) Nurse aide salaries while in training are factored into the vendor rate and are not to be included on the reimbursement voucher.

(3) Training program costs that exceed the DADS cost ceiling must have prior approval from DADS before costs can be reimbursed. A written request to Provider Billing Services must include:

(A) name and vendor number of facility.

(B) description of training program for which the facility is seeking reimbursement approval, to include:

(i) name, telephone number and address of the nurse aide training and competency evaluation program (NATCEP);

(ii) whether the NATCEP program is facility or non-facility-based; and

(iii) name of the NATCEP program director.

(C) an explanation of why the cost for the NATCEP exceeds the reimbursement ceiling. The explanation must include:

(i) a completed nurse aide unit cost calculation form for a facility-based NATCEP; or

(ii) a breakdown of the nurse aide unit cost by the instructor fees and training materials for a non-facility-based NATCEP.

(D) an explanation of why the nursing facility cannot utilize a training program at or below the reimbursement ceiling and what steps the facility has taken to explore more cost efficient training courses. The explanation must include:

(i) the availability of NATCEPs, such as the location or the frequency of training offered, in the geographic region of the facility;

(ii) the name and address of each NATCEP that the facility has explored as a provider of nurse aide training; and

(iii) the cost per nurse aide for each NATCEP identified in clause (i) of this subparagraph, as specified in subparagraph (C)(i) or (ii) of this paragraph.

(4) All prior approval requests as outlined in paragraph (3) of this subsection must be submitted to DADS, Provider Billing Services that:

(A) may request additional information in order to evaluate a reimbursement request; and

(B) will make the final decision on a reimbursement request.

(5) All nurse aide training courses must be approved by DADS before costs associated with them can be reimbursed.

(6) Nursing facilities are responsible for tracking and documenting nurse aide training costs for each nurse aide trained. All documentation is subject to DADS audits. If substantiating documentation for amounts billed to DADS cannot be verified, DADS will immediately recoup funds paid to the facility.

(7) Individuals who have successfully completed a nurse aide training and competency evaluation program (NATCEP) may be directly reimbursed for costs incurred in completing a NATCEP. The individual must meet all of the conditions specified in subparagraphs (A) - (E) of this paragraph.

(A) The individual must not have been employed at the time of completing the NATCEP.

(B) The individual must have been employed by, or received an offer of employment from, a nursing facility not later than 12 months after successfully completing the NATCEP.

(C) The individual must have been employed by the facility for no less than six months.

(D) The nursing facility must not have claimed reimbursement for training expenses for the individual.

(E) The individual must be listed on the current Nurse Aide Registry.

(8) Individuals must submit cost reimbursement vouchers to DADS with proof that the individual has been employed by a facility for no less than six months.

(9) Individuals who leave nursing facility employment before accruing the required six months of employment, as specified in paragraph (7)(C) of this subsection, may receive 50% reimbursement as long as the individual was employed for no less than three months.

(10) Reimbursement to individuals may not exceed the reimbursement ceiling as detailed in paragraph (1)(A) of this subsection.

(e) Oxygen costs. Oxygen costs incurred on or after January 1, 1995, will not be reimbursed on cost reimbursement vouchers. Those oxygen costs must be reported as expenses on the cost report.

(f) TILE to RUG-III Hold Harmless Transition. For rates effective September 1, 2008, payment rates for the direct care staff component and the other recipient care component will be updated within available funds, payment rates for the dietary, general/administration and fixed capital asset rate components will be equal to the rates in effect on August 31, 2008 times 1.025, payment rates for the professional and general liability insurance add-on and the professional-only liability insurance add-on will be equal to the rates in effect on August 31, 2008 times 1.024, and the payment rate for the general-only liability insurance add-on will be equal to the rate in effect on August 31, 2008 times 1.018.

(1) To calculate the updated direct care staff per diem rate component for each of the RUG-III case mix groups and for the default groups, divide each of the standardized statewide case mix indexes from subsection (b)(3)(C) of this section by 0.9908, which is the weighted average TILE case mix index for the 1998 cost reporting period, multiply each quotient by the statewide average TILE case mix index for the period beginning the first day of December, 2007 and ending the last day of February, 2008 as represented in the Texas Department of Aging and Disability Services (DADS) Claims Management System (CMS) on or around June 1, 2008 and multiply each product by the average updated direct care staff rate component.

(2) To calculate the updated other recipient care per diem rate component for each of the RUG-III case mix groups and for the default groups, divide each of the standardized statewide case mix indexes from subsection (b)(3)(C) of this section by 1.0267, which is the weighted average TILE case mix index for the 2005 cost reporting period, multiply each quotient by the statewide average TILE case mix index for the period beginning the first day of December, 2007 and ending the last day of February, 2008 as represented in the Texas Department of Aging and Disability Services (DADS) Claims Management System (CMS) on or around June 1, 2008 and multiply each product by the average updated other recipient care rate component.

(3) For state fiscal year 2009 only, for each Medicaid-contracted nursing facility, HHSC will:

(A) Calculate the sum of the weighted average TILE direct care staff base rate (with no enhancements) and other recipient care rate based on the TILE rates for these cost areas in effect on August 31, 2008 and the facility's approved to be paid days of service by TILE from January 1, 2008 through June 30, 2008 as represented in the Texas Department of Aging and Disability Services (DADS) Claims Management System (CMS) on or around November 3, 2008.

(B) Calculate the sum of the weighted average RUG-III direct care staff base rate (with no enhancements) and other recipient care rate based on the RUG rates for these cost areas in effect on September 1, 2008 and the facility's approved to be paid days of service by RUG-III for those recipients paid under RUG-III from September 1, 2008 through February 28, 2009 as represented in the DADS CMS on or around March 31, 2009.

(C) Compare the sum from subparagraph (A) of this paragraph to the sum from subparagraph (B) of this paragraph. If the sum from subparagraph (A) is greater then the sum from subparagraph (B), DADS will pay the facility 80 percent of the difference between the sum from subparagraph (A) and the sum from subparagraph (B) times the facility's approved to be paid days of service for those recipients paid under RUG-III from September 1, 2008 through February 28, 2009 as represented in the DADS CMS on or around March 31, 2009.

(D) Calculate the sum of the weighted average RUG-III direct care staff base rate (with no enhancements) and other recipient care rate based on the RUG rates for these cost areas in effect on September 1, 2008 and the facility's approved to be paid days of service by RUG-III for those recipients paid under RUG-III from March 1, 2009 through August 31, 2009 as represented in the DADS CMS on or around September 30, 2009.

(E) Compare the sum from subparagraph (A) of this paragraph to the sum from subparagraph (D) of this paragraph. If sum from subparagraph (A) is greater then the sum from subparagraph (D), DADS will pay the facility 80 percent of the difference between the sum from subparagraph (A) and the sum from subparagraph (D) times the facility's approved to be paid days of service for those recipients paid under RUG-III from March 1, 2009 through August 31, 2009 as represented in the DADS CMS on or around September 30, 2009.

(F) Calculate the sum of the weighted average RUG-III direct care staff base rate (with no enhancements) and other recipient care rate based on the RUG rates for these cost areas in effect on September 1, 2008, and the facility's approved to be paid days of service by RUG-III for those recipients paid under RUG-III from September 1, 2008, through August 31, 2009, as represented in the DADS CMS on or around January 4, 2010.

(G) Compare the sum from subparagraph (A) of this paragraph to the sum from subparagraph (F) of this paragraph.

(i) If the sum from subparagraph (A) is greater than the sum from subparagraph (F), determine the difference between the sum from subparagraph (A) and the sum from subparagraph (F) times the facility's approved to be paid days of service for those recipients paid under RUG-III from September 1, 2008, through August 31, 2009, as represented in the DADS CMS on or around January 4, 2010, and subtract the hold harmless payments made under subparagraphs (C) and (E) from the product calculated in this clause.

(I) If the result is a positive number, DADS will pay the facility the difference.

(II) If the result is a negative number, DADS will recoup the difference from the facility.

(ii) If the sum from subparagraph (A) is less than the sum from subparagraph (F) and the facility received a hold harmless payment under subparagraph (C) and/or (E), DADS will recoup from the facility the hold harmless payments made under these subparagraphs.

(4) "On or around" as used in this subsection means the date that the state pulls the information as described in the subsection as close to the dates specified in subsection as feasible and determined by the state. Once the state does the data pull, no other pulls will be made for the purpose of calculating the values described in this subsection. This means that once the paid days of service for a paragraph have been determined for purposes of calculating the TILE to RUG-III hold harmless transition, they will not be updated for late Minimum Data Set (MDS) submissions, Utilization Review RUG-III changes, retroactive eligibility or any other reason.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §26.57

The Public Utility Commission of Texas (commission) adopts new §26.57, relating to the requirements for a certificate holder's use of an alternate technology to meet its provider of last resort (POLR) obligations, with changes to the proposed text as published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1333). The new rule implements the requirements of Public Utility Regulatory Act (PURA) §54.251(c), which provides that a holder of a certificate of convenience and necessity or a certificate of operating authority (certificate holder) may meet its POLR obligations using any available technology, so long as it meets minimum quality of service standards, including standards for 911 service, comparable to those established for traditional wireline or landline technologies, as determined by the commission, and shall offer services at a price comparable to the monthly service charge for comparable services in that exchange or the provider's nearest exchange. This new rule is adopted under Project Number 31958.

Initial comments on the proposed rule were filed by Big Bend Telephone Company (Big Bend), the Office of Public Utility Counsel (OPUC), Southwestern Bell Telephone Company, d/b/a AT&T Texas (AT&T), Texas State Telephone Cooperative, Inc. (TSTCI), Texas 911 Alliance and the Texas Commission on State Emergency Communications (collectively the 911 Alliance), GTE Southwest Incorporated, d/b/a Verizon Southwest (Verizon), and Sprint Communications Company, LP, Sprint-Com, Inc., Sprint Spectrum, LP, Nextel of Texas, Inc., NPCR, Inc., Time Warner Telecom of Texas, LP, Time Warner Cable Information Services (Texas), LLC, and TWC Digital Phone, LLC (collectively, the USF Reform Coalition). Reply comments were filed by AT&T and Verizon.

General Comments

TSTCI commented that prior to the adoption of PURA §54.251(c) and the advent of local competition in the telecommunications industry, neither PURA nor the commission's Substantive Rules specified the type of technology certificate holders must use to provide service. Moreover, TSTCI stated that wireline technology was not mandated by law or rule as a preferred technology, and there was no process or requirement for a certificate holder to seek approval to use an alternate technology. If a CCN holder using an alternate technology could not meet the standards required in §26.54, or another rule, it generally filed for a waiver from that rule because no other technology was available. TSTCI noted that a few of its member companies have used alternate technologies like Basic Exchange Telephone Radio Service (BETRS) to serve extremely remote customers for many years.

Big Bend stated that it has been using some form of alternate technology to provide Basic Local Telecommunications Service (BLTS) for the past forty-nine years. Big Bend opined that the proposed rule adds nothing new to the current regulatory fabric and, in fact, may unintentionally diminish the commission's traditional regulatory oversight of BLTS when offered via alternate technologies. Big Bend suggested that the new rule could eliminate the applicability of the customer protection rules currently applicable to BLTS when provided by a provider of last resort utilizing an alternate technology.

Big Bend and TSTCI commented that instead of adopting a new rule specific to alternate technologies, the commission should either eliminate or modify existing rules that currently apply to all technologies.

In reply comments, Verizon disagreed with TSTCI that moderate changes to the existing service quality rules would suffice. Verizon opined that the workable solution arrived in the new rule would allow efficient implementation of new technologies.

TSTCI commented that the proposed approval process for alternate technologies represents a step backward in the commission's efforts over the last several years to eliminate unnecessary and burdensome regulation and rule requirements.

Big Bend stated that it is opposed to the adoption of the new rule because the commission already has rules in place to deal with certificate holders' BLTS offerings. Big Bend opined that the adoption of this rule may result in some certificate holders arguing that because they utilize an alternate technology to provide BLTS, the proposed rule replaces otherwise-applicable technology-neutral regulations that likely afford greater protections than those enumerated in the proposed rule.

In reply comments, Verizon disagreed with Big Bend and noted that the rule's intent is clearly to regulate the use of an alternate technology used by a POLR and is not intended to replace any other obligations a certificate holder has under the commission's substantive rules.

TSTCI opined that the intent of PURA §54.251(c) is to enable the commission to regulate TUSF disbursements and quality of service obligations for alternate technologies--not to establish an approval process for use of alternate technologies. TSTCI suggested that instead of having an approval process to use alternate technologies, a certificate holder could simply provide notice to the commission of its intent to use a nontraditional or alternate technology.

TSTCI and Big Bend stated that if the commission decides to adopt the rule in its present form, language should be added to grandfather existing alternate technologies that are currently being used by certificate holders.

In reply comments, Verizon agreed with TSTCI's contention that the rules should not require certification of an existing technology, and proposed that currently-utilized methods be grandfathered-in.

OPC commented that the proposed rule is unclear on how comparisons can or should be made across technologies. OPC opined that where technology differences necessitate different measurements in order to meet the same quality of service root standard then it is appropriate to set out what the different technologies must do in order to meet the root standard. OPC suggested that the proposed rule should be construed as consistent with certain "root" customer concerns such as: (1) service activation; (2) customer service; (3) service reliability;

(4) transmission quality; and (5) other requirements including the provision of 911 emergency telecommunications. These standards should be technologically neutral.

Verizon and the USF Reform Coalition opined that because technologies are constantly changing, it is reasonable and appropriate for the commission to consider each technology's ability to meet the statutory standards on a case-by-case basis.

Commission Response

PURA §54.251(c) provides that a certificate holder with POLR obligations may use any available technology to meet those obligations. PURA §54.251(c) further provides that, as determined by the commission, a certificate holder shall meet minimum quality of service standards, including standards for 911 service, comparable to those established for traditional wireline or landline technologies and shall offer services at a price comparable to the monthly service charge for comparable services in that exchange or the provider's nearest exchange. In the rule, the commission sets the standards by which certificate holders with POLR obligations may obtain a commission determination relative to their use of technologies other than traditional wireline or landline technologies to meet their POLR obligations. The standards for the use of wireline technology to meet a dominant certificate holder's service quality obligations are found in §26.54 (relating to Service Objectives and Performance Benchmarks) and the other rules in Chapter 26, Subchapter C. This new option for certificate holders with POLR obligations must be consistent with the commission's obligations to ensure customers have high-quality service under PURA §11.002(c) and §54.251(a)(2) and to "encourage and accelerate the development of a competitive and advanced telecommunications environment and infrastructure" under PURA §51.001(a). Thus the commission must harmonize these sometimes conflicting obligations and establish a rule implementing PURA §54.251(c) that is not burdensome or inflexible for certificate holders with POLR obligations, yet that still ensures consumers have access to a high level of service quality and customer service.

The new rule applies to all certificate holders with POLR obligations, regardless of how they are regulated by this commission. However, as pointed out by several commenters, the rule applies only to certificate holders when they deploy a technology other than traditional wireline or landline to meet their POLR obligations. The rule is technology neutral and does not regulate investment or deployment decisions in any manner other than by imposing the requirements of PURA §54.251(c).

The commission agrees with TSTCI; there is no express requirement under statute or rule that a certificate holder with POLR obligations must use any particular technology, including traditional wireline or landline technology. However, since the enactment of PURA §54.251(c) in September 2005, there has been an express requirement that the commission use its established service quality rules for traditional wireline or landline technology as a basis for making a determination as to whether any other technology used by a certificate holder is "comparable" for purposes of §54.251(c).

PURA §54.251(c) does not require service quality for technologies other than traditional wireline or landline to be "identical" to the commission's established service quality requirements, which for transmission quality are based on traditional wireline or landline technology, only that the service quality be "comparable," as determined by the commission. Therefore, this rule specifies the commission's established service quality rules as the baseline from which it will determine whether or not other technologies are "comparable" for purposes of §54.251(c).

The new rule protects customers by ensuring minimum standards for service quality, customer service, and pricing. It also protects certificate holders with POLR obligations who choose to deploy a technology other than traditional wireline or landline technology to meet their POLR obligations, because a determination by the commission that certain service quality standards are "comparable" may eliminate the possibility of certain types of customer complaints and any potential enforcement actions relating to service quality.

The commission agrees with Verizon that the new rule should allow efficient implementation of technologies other than traditional wireline or landline. The commission disagrees with Big Bend and notes that the rule's intent is to regulate the use of technology other than traditional wireline or landline if used by a certificate holder to meet its POLR obligations and is not intended to replace any other obligations a certificate holder has under the commission's substantive rules. The commission agrees with Verizon that because technologies are constantly changing, it is reasonable and appropriate to consider each technology's comparability for purposes of PURA §54.251(c) on a case-by-case basis. The commission agrees with TSTCI that existing technologies, other than traditional wireline or landline, that are already deployed and have been approved by the commission for use by a particular certificate holder, should be grandfathered. However, in the event a certificate holder with POLR obligations has already deployed a technology other than traditional wireline or landline technology and has not obtained the commission's approval, such deployment is not grandfathered.

Subsections (a) and (b)

OPC noted that the proposed rule uses the term "provider of last resort" and "POLR" rather than "carrier of last resort" or "COLR," as is used in other sections of Chapter 26 of the commission's rules. OPC suggested that this dichotomy of terms within the same body of rules should be resolved so as to avoid confusion or possible misinterpretation that could result from the use of two separate terms for the same obligation. OPC opined that in order to effectuate the intent of the commission and Legislature, the fact that two different terms have been used should be acknowledged and that the proposed rule should make clear that "provider of last resort" and "carrier of last resort" have the same meanings. OPC proposed that a new term "ACOLR", defined as a holder of a certificate of convenience and necessity or certificate of operating authority that uses alternate technology to meet its carrier of last report (COLR) obligations under PURA §54.251(c), be added to subsection (b).

Big Bend stated that the term "POLR obligations" should be defined.

Commission Response

The commission has changed subsection (a) to make clear that "provider of last resort" and "carrier of last resort" have the same meaning. The commission declines to adopt the term ACOLR, because it believes that introducing this technology-based differentiation is inconsistent with the purpose of this rule. In addition, it is unnecessary to define POLR obligations in this rule.

Subsection (d)(1)(A) and (d)(1)(B)

AT&T opined that these two requirements should be deleted from the rule because neither of the rules contained within these subsections are true "service quality" standards.

Commission Response

The commission declines to delete subsections (d)(1)(A) and (B). Subsection (d)(1)(A) requires a certificate holder to show that in deploying a technology other than traditional wireline or landline to meet its POLR obligations, it has comparable provisions to ensure the continuity of service during emergency situations as required for traditional wireline or landline technologies under §26.52 of this title (relating to Emergency Operations). The intent of the subsection (d)(1)(B) is to ensure that the certificate holder that deploys a technology other than traditional wireline or landline to meet its POLR obligations has programs in place that allow for periodic tests, inspections, and preventive maintenance aimed at achieving efficient operation of its system and provision of safe, adequate, and continuous service. The types of tests and test points may not be the same as are provided for traditional wireline or landline technology, but the requirement of the rule is that the certificate holder is required to show how other types of tests that are applicable to its chosen technology are comparable in ensuring provision of safe, adequate, and continuous service. Similar to the commission's response above to general comments, it concludes that these requirements are important to protect customers, and obtaining commission approval of any waiver or modification of the requirements in these two subsections protects the certificated holder that has chosen to deploy a technology other than traditional wireline or landline to meet its POLR obligations.

Subsection (d)(2)(A)

Texas 9-1-1 Agencies, OPC, AT&T, and Verizon each proposed alternative language for subsection (d)(2)(A).

Commission Response

The commission concurs with alternative language proposed by Texas 911 agencies for subsection (d)(2)(A) and has incorporated the alternative language into the new rule.

Subsection (d)(2)(B)

Verizon commented that the requirements of this subsection are already required by some other statute or are an unreasonable burden on the alternate technology (if it must provide something that other technologies do not).

Commission Response

The commission does not consider the requirements of this subsection as unreasonable or burdensome because this requirement is comparable to that imposed on all providers of telecommunications service in §26.272(e)(1)(B)(i)(V) of this title (relating to Interconnection). Further this requirement clarifies that if the certificate holder uses an alternate technology to meet its POLR obligations that can be used in either a fixed or nomadic form, if the service is provided at a fixed location, a validated address must be provided.

Subsection (e)

Verizon opined that the word "detailed" is superfluous and should be omitted from this section. The USF Reform Coalition proposed that this subsection require an applicant to file its application in a format that is "publicly available" to all interested parties.

In reply comments, AT&T stated that the USF Reform Coalition's proposed revisions are unnecessary because the commission's rules prohibit a party from filing an entire application under seal if only part of it contains confidential information.

Commission Response

The commission concurs with AT&T. Non-confidential information must be filed with the commission in a non-confidential filing. In addition, §22.71(d)(1) of this title (relating to Filing of Pleadings, Documents, and Other Materials) states that a confidential filing shall not include any non-confidential materials unless directly related to and essential for clarity of the confidential material. If a party believes material has been improperly filed as confidential, the party may move to have the material declassified. In addition, any person who is not also a party to the contested case in which confidential information is filed may file a request for the information in the commission's possession by submitting a Public Information Act (PIA) request in writing to open.records@puc.state.tx.us. As required by the PIA, if confidentially filed information is requested, the PUC will notify the submitting party of the request and forward the information to the Office of the Attorney General for review and decision. Please see http://www.puc.state.tx.us/about/openrec.cfm#con for more information.

Subsection (f)(1)

The 911 Alliance proposed a requirement that the applicant provide notice to the Texas Commission on State Emergency Communications within two working days of filing its application. AT&T stated that it agreed with the notice requirement proposed by the 911 Alliance.

Commission Response

The commission concurs with the 911 Alliance's proposed changes to the notice requirement and has incorporated these changes in the new rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This new rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supplement 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §11.002, which expresses the purpose of Title II of PURA to grant the commission authority to make and enforce rules necessary to protect telecommunications customers, in the context of increased competition and changes in market structure and technology, §51.001, which expresses the purpose of Subtitle C of Title II of PURA to grant the commission authority to make and enforce rules necessary to protect telecommunications customers, in the context of increased competition and changes in market structure and technology and the need for standards for service quality, customer service, and fair business practices, and §54.251(c), which provides for the commission to establish quality of service standards that are comparable to the standards for wireline or landline service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 11.002, 51.001, and 54.251.

§26.57. Requirements for a Certificate Holder's Use of an Alternate Technology to Meet Its Provider of Last Resort Obligation.

(a) Purpose. This section establishes the requirements that apply when a certificate holder uses an alternate technology to meet its provider of last resort (POLR, sometimes also referred to as a carrier of last resort in other parts of this chapter) obligations.

(b) Definitions. The following terms used in this section shall have the following meanings, unless the context indicates otherwise.

(1) Alternate technology--a technology other than traditional wireline or landline technologies.

(2) Certificate holder--a holder of a certificate of convenience and necessity or a certificate of operating authority.

(c) Application of this section. A certificate holder may use an alternate technology to meet its POLR obligations only after the commission approves the use of that alternate technology by the certificate holder pursuant to this section. A certificate holder must obtain approval for each type of alternate technology used to meet its POLR obligations. Unless determined otherwise by the commission, upon receiving approval to use an alternate technology to meet its POLR obligations, a certificate holder may use that technology anywhere in its service territory to meet its POLR obligations. If, as of the effective date of this rule, a certificate holder has deployed an alternate technology to meet its POLR obligations and obtained commission approval for that alternate technology, the certificate holder is not required to obtain approval for that alternative technology pursuant to this section unless it seeks changes to what was approved by the commission.

(d) Standards for meeting POLR obligations using an alternate technology. In using an alternate technology to meet its POLR obligations, a certificate holder shall comply with the following standards.

(1) Quality of service. Unless determined otherwise by the commission, the certificate holder shall meet applicable minimum quality of service standards comparable to the following requirements.

(A) §26.52 of this title (relating to Emergency Operations);

(B) §26.53 of this title (relating to Inspections and Tests); and

(C) §26.54 of this title (relating to Service Objectives and Performance Benchmarks).

(2) 911 Service. The certificate holder shall meet the following 911 service requirements.

(A) A certificate holder shall provide 911 services comparable to the requirements established for traditional wireline or landline technologies; and

(B) A certificate holder providing 911 service to a fixed location shall include validated address location as part of the Automatic Location Identification.

(3) Price. The service provided by the certificate holder to meet its POLR obligations in an exchange shall be offered at a price comparable to the monthly service charge for comparable services in that exchange or in the certificate holder's nearest exchange.

(e) Application to meet its POLR obligations using an alternate technology. A certificate holder shall file a detailed application demonstrating that the certificate holder meets the standards set forth in subsection (d) of this section.

(f) Commission processing of application.

(1) Notice.

(A) The commission shall provide notice in the Texas Register.

(B) Not later than two working days after filing an application, the applicant shall notify the Commission on State Emergency Communications by providing it a copy of the application.

(C) The applicant shall provide additional notice as required by the commission.

(2) Sufficiency of application. A motion to find an application materially deficient shall be filed no later than 15 working days after an application is filed. The motion shall be served on the applicant such that the applicant receives it by the day after it is filed. The motion shall specify the nature of the deficiency and the relevant portions of the application, and cite the particular requirement with which the application is alleged not to comply. The applicant's response to a motion to find an application materially deficient shall be filed no later than five working days after such motion is received. If within 26 working days after the filing of the application, the presiding officer has not filed a written order concluding that material deficiencies exist in the application, the application is deemed sufficient. The presiding officer shall notify the parties of any material deficiencies by written order and the applicant must cure the deficiencies within 30 days of receipt of the order.

(3) Review of application. If the requirements of §22.35 of this title (relating to Informal Disposition) are met, the presiding officer shall issue a notice of approval or proposed order within 60 days of the date a materially sufficient application is filed unless good cause exists to extend this deadline. If the requirements of §22.35 of this title are not met, the presiding officer shall establish a procedural schedule that provides for the resolution of the issues in the proceeding.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 10, 2009.

TRD-200902836
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: July 30, 2009
Proposal publication date: February 27, 2009
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 74. ELEVATORS, ESCALATORS, AND RELATED EQUIPMENT

16 TAC §74.55

The Texas Commission of Licensing and Regulation ("Commission") adopts an amendment to 16 Texas Administrative Code §74.55, concerning the Elevators, Escalators and Related Equipment program, without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 923), and will not be republished. The amendment takes effect August 1, 2009.

The rule amendment implements the Texas Department of Licensing and Regulation's ("Department") new procedure requiring elevator inspectors to report to the Department when they have completed an inspection of equipment.

New subsection (d) requires inspectors to notify the Department when they have completed an inspection of any equipment. The statute, Health and Safety Code, Chapter 754, requires building owners to file with the Department a copy of the inspection report after the inspector has completed the inspection. If the owner

fails to file the report, the Department has no information in its records concerning it and does not have any way to know that the inspection has been performed. By requiring the inspector to inform the Department that an inspection has been completed, the Department will be aware that a report for the equipment is due and can follow up with the owner if the report is not filed.

The Department specifically has included in the rule alternative methods for inspectors to use in order to avoid adverse economic impact. The amendment includes several methods by which inspectors may report, two of which will not cause inspectors to incur any additional costs. Reports can be electronically mailed to the Department or they can be directly entered into a database prepared by the Department to accept the reports. The Department prefers that the latter method be used since it will result in the data going directly into a system that can be used to track it, thus reducing data input effort for its employees. For those who do not have access to computers, or who do not wish to use them for making the reports, they may be filed by mail, fax or by telephone.

The proposed amendment was published in the *Texas Register* on February 13, 2009. The public comment period ended March 16, 2009. The Department did not receive any public comments on the proposal.

The amendment is adopted under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 754 which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Texas Health and Safety Code, Chapter 754. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902815
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 1, 2009
Proposal publication date: February 13, 2009
For further information, please call: (512) 463-7348

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 21. WATER QUALITY FEES

30 TAC §21.3

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts the amendment to §21.3 *with changes* to the proposed text as published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1780).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Water Resource Management Account 153 (Account 153) is the primary source of state funding for essentially all water program related activities of the commission. In 2001, the 77th Legislature passed House Bill (HB) 2912 which provided that revenues deposited to Account 153 would be available to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities including water rights, storm water, public drinking water, Total Maximum Daily Load (TMDL) development, water utilities, wastewater, river compacts, water availability modeling, water assessment, Concentrated Animal Feeding Operations (CAFOs), sludge, Clean Rivers Program, and groundwater protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water program activities.

General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. In addition, many of the water-related fees that the agency does assess have not increased in seven to ten years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. As a result, the fund balance is close to being depleted. The revenue estimates for Account 153 revealed that without an increase in fees there would be insufficient funds for the agency to cover the costs of its water program activities in fiscal year (FY) 2010 - 2011.

Given the declining availability of funds in Account 153, the commission reviewed those water related fees it has the authority to change. After a review of the commission's existing water-related fees, the commission is adopting revisions to the consolidated water quality (CWQ) fee, the public health service (PHS) fee, and the water use assessment fee (WUF) to generate sufficient revenue to cover the costs of its water program activities beginning in FY 2010. These fees were identified for a fee increase because, in terms of numbers and categories of fee payers, they represent some of the most broad-based water-related fees the agency assesses, revision of these three fees does not require statutory changes and their revenue stream is relatively stable and represents significant water fee collections.

This adopted rulemaking amends Chapter 21, Water Quality Fees, to ensure that there are sufficient funds in FY 2010 to carry out the tasks required to protect the water resources of the state. In a corresponding rulemaking published in this issue of the *Texas Register,* the commission adopts the amendment to 30 TAC Chapter 290, Public Drinking Water.

SECTION DISCUSSION

The commission adopts the amendment to §21.3(b)(2) that deletes the reference to a maximum fee for wastewater permits and aquaculture permits in this paragraph and instead refers to the amount as provided in the Texas Water Code (TWC). The statutory caps at the time of proposal were $75,000 for wastewater permits and $5,000 for aquaculture permits and are set forth in TWC, §26.0291 and §29.0292, respectively. During the 81st Legislative Session, 2009, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The commission adopts this change to refer to any statutory caps and to allow for

the possibility that the caps may be amended by the legislature in the future. In this paragraph, the commission also adopts the increase of the minimum fee for active permits to $1,250 and for inactive permits to $620.

The commission adopts the amendment to §21.3(b)(5) that revises the fee rate schedule to delete the fixed dollar amount for each factor and in its place provide a maximum amount that could be assessed for each factor. The maximum amount adopted for each factor is an increase above the fixed dollar amount that currently exists in the rules. The amount applied to each factor will be determined by the annual appropriations and other costs from Account 153, in addition to any statutory cap on fees for individual permits, and would be applied uniformly to all permits subject to the particular factor being applied. In adopted §21.3(b)(5)(A), the commission increases the amount for contaminated flow from a fixed amount of $700 per million gallons per day (mgd) to a maximum amount that could be assessed of $1,090 per mgd. In addition, the commission adopts the amendment to §21.3(b)(5)(A) that defines the acronym mgd as "million of gallons per day." In adopted §21.3(b)(5)(B), the commission increases the amount for uncontaminated flow from a fixed amount of $10.00 per mgd to a maximum amount that could be assessed of $18 per mgd. In adopted §21.3(b)(5)(C), the commission increases the amount for traditional pollutants from a fixed amount of $15 per pound per day to a maximum amount that could be assessed of $23 per pound per day. In adopted §21.3(b)(5)(D)(i), the commission increases the amount for industrial discharges with a toxic rating of Group I from a fixed amount of $200 to a maximum amount that could be assessed of $310. In adopted §21.3(b)(5)(D)(ii), the commission increases the amount for industrial discharges with a toxic rating of Group II from a fixed amount of $700 to a maximum amount that could be assessed of $1,090. In adopted §21.3(b)(5)(D)(iii), the commission increases the amount for industrial discharges with a toxic rating of Group III from a fixed amount of $1,050 to a maximum amount that could be assessed of $1,640. In adopted §21.3(b)(5)(D)(iv), the commission increases the amount for industrial discharges with a toxic rating of Group IV from a fixed amount of $1,575 to a maximum amount that could be assessed of $2,460. In adopted §21.3(b)(5)(D)(v), the commission increases the amount for industrial discharges with a toxic rating of Group V from a fixed amount of $3,150 to a maximum amount that could be assessed of $4,910. In adopted §21.3(b)(5)(D)(vi), the commission increases the amount for industrial discharges with a toxic rating of Group VI from a fixed amount of $6,300 to a maximum amount that could be assessed of $9,830. In adopted §21.3(b)(5)(E), the commission increases the amount for a major permit designation from a fixed amount of $2,000 to a maximum amount that could be assessed of $3,120. In adopted §21.3(b)(5)(F), the commission increases the amount for a storm water authorization from a fixed amount of $500 to a maximum amount that could be assessed of $780. The commission adopts these changes to allow the commission the ability to assess fees as needed to cover, in part, the cost of its water program activities. The increase will be used to fund the water program activities of the state based on the appropriation levels set by the state legislature.

The commission adopts the amendment to §21.3(b)(6)(A) that increases the minimum amount for an active land application permit fee from $800 per year to $1,250 per year. The commission adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(B) that increases the minimum amount for an inactive permit fee from $400 per year to $620 per year. The commission adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(C) that increases the fee for an active storm water permit which authorizes the discharge of storm water only, with no other wastewater, from a fixed amount of $500 to a maximum amount that could be assessed of $780. The commission adopts this change to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities. The commission adopts the amendment to §21.3(b)(6)(D)(iii) that deletes the reference to a maximum fee for aquaculture permits in this paragraph and instead refers to the amount as provided in the TWC. The commission added the word "maximum" between "The" and "annual." This word is needed to make this provision consistent with the language in §21.3(b)(2). The existing statutory cap of $5,000 is set forth in TWC, §26.0292. The commission adopts this change to refer to any statutory cap and to allow for the possibility that the cap may be adjusted by the legislature in the future.

The commission adopts the amendment to §21.3(b)(7), which provides the commission the authority to adjust CWQ fees through the use of a multiplier. The commission adopts the change to the current multiplier from one to an amount up to a maximum of 1.75 to give the commission sufficient flexibility in assessing fees within the specified parameters. The use and amount of the multiplier will be determined by the annual appropriations and other associated costs from Account 153, in addition to any statutory cap on fees for individual permits, and will be applied uniformly to all permits subject to the water quality fee. Additionally, the commission adopts the requirement that the executive director report to the commission as part of the approval of the annual operating budget the multiplier that will be applied for the upcoming FY.

The commission adopts the amendment to §21.3(c)(3), which provides the commission the authority to assess a fee for consumptive use under a water right that authorizes diversion of more than 250 acre-feet per year. The existing rule provides that the fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use is $.22 per acre-foot up to 20,000 acre-feet, and $.08 per acre-foot thereafter. Under the adopted change, a fee of $.385 per acre-foot would be assessed for all water rights for consumptive use that authorize diversion of more than 250 acre-feet per year, including those above 20,000 acre-feet. The adopted change would delete the provision that reduces the fee to $.08 for water rights above 20,000 acre-feet per year. The amount of the increase from $.22 to $.385 reflects the application of a factor of 1.75, which is the maximum amount adopted as a multiplier for the CWQ fee.

The commission adopts the amendment to §21.3(c)(5) that combines paragraphs (5) and (6) to eliminate a stand-alone provision for the fee for water rights for hydropower purposes and incorporate it into the non-consumptive use paragraph. By incorporating the fee for water rights for hydropower purposes into the non-consumptive use paragraph, the fee amount of $.04 per acre-foot in the existing rule changes to $.021 per acre-foot. Additionally, the adopted rule deletes the tiered structure that exists for both the non-consumptive use paragraph and the water rights for hydropower purposes paragraph. That structure provided for reduced fee amounts for usage above a certain threshold. Under the adopted rule the minimum threshold of 2,500 acre-feet per year for assessing a fee, which was inadvertently deleted

in the proposal, is added back in. This language promotes administrative efficiency by taking into account the cost associated with issuing bills. The adopted change does not affect the exemption from the fee for a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts. The subsequent paragraph is renumbered and a change is made to paragraph (2) to reflect this adopted change.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted rule is part of a larger rulemaking to increase fees in order to provide funding for the commission's water program activities. The corresponding rulemaking, adopted amendments to Chapter 290, Public Drinking Water, is published in this issue of the *Texas Register.* The adopted amendment to Chapter 21 does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with the statutory requirements set forth in the TWC. Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, it is not subject to the Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225 only applies to a state agency's adoption of a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirements of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the adopted rulemaking does not exceed an express requirement of state law, but rather seeks to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with state law. Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections which are cited in the STATUTORY AUTHORITY section of this preamble.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the adopted rulemaking does not constitute a taking. The specific purpose of the adopted rulemaking is to provide the commission with the additional revenue necessary to operate its water program activities in a manner that is consistent with the statutory requirements set forth in the TWC.

This rulemaking substantially advances this stated purpose by adjusting the factors by which the fees are calculated to provide funding at a level that is sufficient to support a portion of the commission's water program.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulation does not affect a landowner's rights in private real property because the rulemaking does not burden, restrict, or limit the owner's right to real property, and does not reduce the market value of real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water program activities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on April 7, 2009 in Austin, Texas. At the hearing the commission received comments from the City of Austin (Austin); the City of Houston (Houston); El Paso Water Utilities (El Paso); Luminant Power (Luminant); and the San Antonio Water System (SAWS). The comment period closed on April 13, 2009.

The commission received written comments from: Agua Special Utility District (Agua SUD); American Electric Power (AEP); the Association of Electric Companies of Texas, Inc. (AECT); Bethesda Water Supply Corporation (Bethesda WSC); the Honorable Ronald F. Branson, Mayor of Carrollton (Mayor Branson); Calpine Corporation (Calpine); City of Arlington Water Utilities Department (Arlington Water Utilities); City of Brownwood (Brownwood); City of Carrollton, Public Works Department

(Carrollton, Public Works Department); City of Cleburne (Cleburne); City of Denton (Denton); City of Grandview (Grandview); City of Hughes Springs, including the Honorable Reba Simpson, Mayor of City of Hughes Springs; the Honorable James Samples, Mayor Pro Tem, City of Hughes Springs, the Honorable William V. Jones, City Council Member, City of Hughes Springs, and the Honorable Lee Newsom, City Official, City of Hughes Springs (together referred to as Hughes Springs); City of Jefferson (Jefferson); City of Lone Star (Lone Star); City of Odessa (Odessa); City of Ore City (Ore City); City of Pittsburg (Pittsburg); City of Plainview, Public Works Department (Plainview Public Works); City of Pleasanton (Pleasanton); City of Rosenberg (Rosenberg); City of Sugar Land (Sugar Land); City of Taylor Landing (Taylor Landing); City of Wylie (Wylie); El Paso Water Utilities (El Paso); Guadalupe-Blanco River Authority (GBRA); Hardin County Water Control and Improvement District No. 1 (Hardin County WCID); Kamira Water System (Kamira); Kempner Water Supply Corp. (Kempner WSC); L&L Engineers and Planners, Inc. (L&L); Lake Corpus Christi RV Park and Marina (Lake Corpus Christi RV); Lone Star Chapter of the Sierra Club (Sierra Club); Lower Colorado River Authority (LCRA); Luminant Generation Company LLC (Luminant); New Ulm Water Supply Corp. (New Ulm WSC); Northeast Texas Municipal Water District (Northeast Texas MWD); NRG Texas Power LLC (NRG); SEC Energy Products (SEC); Shin-Etsu Silicones of America (Shin-Etsu); the Honorable Reba Simpson, Mayor of Hughes Springs (Mayor Simpson); Talty Water Supply Corporation (Talty WSC); Texas Association of Business (TAB); Texas Chemical Council (TCC); Texas Municipal League (TML); The Shilk Co., Inc. (Shilk); Upper Guadalupe River Authority (UGRA); Valley Mobile Home Properties (Valley Mobile Home); Water Environment Association of Texas (WEAT); and five individuals. The commission also received a joint comment letter from Arlington Water Utilities; Beaumont Water Utilities; El Paso Water Utilities; Houston Public Works & Engineering; Austin Water Utility; City of Dallas Water Utilities; the Fort Worth Water Department; and the San Antonio Water System. In the RESPONSE TO COMMENT section of this preamble these utilities will be referred to as "the Utilities." WEAT concurs with the comments submitted by the Utilities.

Sierra Club and two individuals supported the rule. Calpine and WEAT supported funding for the commission but suggested changes to the proposed rule as described in the RESPONSE TO COMMENTS section of the preamble. AEP; AECT; Agua SUD; Arlington Water Utilities; Austin; Bethesda WSC; Mayor Branson; Brownwood; Carrollton, Public Works Department; Cleburne; Denton; Grandview; GBRA; Hughes Springs; Houston; Jefferson; Lone Star; Odessa; Ore City; Pittsburg; Pleasanton; Plainview Public Works; Rosenberg; Taylor Landing; Wylie; El Paso; Hardin County WCID; Kamira; Kempner WSC; L&L Lake Corpus Christi RV; LCRA; Luminant; New Ulm WSC; Northeast Texas MWD; NRG; SAWS; SEC; Shin-Etsu; Shilk; Sugar Land; TAB; Talty WSC; TCC; TML; UGRA; the Utilities; Valley Mobile Home; and three individuals opposed the rulemaking.

RESPONSE TO COMMENTS

General

One individual commented that they support the rule.

The commission acknowledges the comment in support of the rule.

One individual commented that if this is an attempt to be more efficient and timely in processing applications and more accountable for time and tax payer money spent, then the commenter is supportive because he believes these departments are severely lacking in these areas.

While this increase is intended to allow the commission to continue performing the same level of water program activities in FY 2010 as it is currently performing, the commission has reviewed and will continue to review its processes for improvements in efficiency, including application processing times.

As a state agency, the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to United States Environmental Protection Agency (EPA) regarding its performance. The commission made no change in response to this comment.

The Sierra Club supports the proposed rules to raise three separate water fees to better support the agency's needs. The Sierra Club also commented that it fully supports changing the PHS fee to a flat per-connection fee and raising the multiplier for the CWQ.

The commission acknowledges the comment in support of the rule.

Calpine expressed support for the efforts by the TCEQ to increase revenue to replace a decrease in general revenue but commented that the selected approach does not provide sufficient lead time for implementation and would disproportionately affect smaller users and dischargers.

Over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the

cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no changes in response to this comment.

WEAT commented that it concurs with comments previously submitted to TCEQ by municipal utility directors.

The letter submitted by the municipal utility directors was a joint letter and the commenters from that letter are referred to as "the Utilities" in the RESPONSE TO COMMENT section of this preamble. The commission acknowledges WEAT's support of the Utilities' comments. The commission made no changes in response to this comment.

Rosenberg commented that the commission should allow the governmental unit the ability to invest this money into infrastructure repair/replacement projects thereby reducing impacts on the environment.

The commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules and acknowledges that a utility investing in its infrastructure is desirable.

However, over the past two budget cycles the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. During the same time period, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency had to raise fees to maintain the same level of water program activities as it is currently providing. The commission made no change in response to this comment.

One individual asked what the fees will pay for.

The fees will provide the majority of funding for the commission's water program which includes activities associated with water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, Clean Rivers Program, and groundwater protection. The commission made no change in response to this comment.

Valley Mobile Home commented that the postcard the commission mailed to potentially affected fee payers had the incorrect Web site listed for the water fees Web page.

On March 9, 2009, the commission mailed a postcard to potentially affected fee payers with a link to a Web page *(www.tceq.state.tx.us/go/waterfees)* that contained information about the proposed fee rule. The commission regrets that the commenter had difficulty accessing this Web page; however, commission staff has checked the Web address on the postcard and found that it is a good and active link. An alternate link by which the Web page can be accessed is *(http://www.tceq.state.tx.us/agency/waterfees.html).* The commission made no change in response to this comment.

One individual asked why the commission asks for comments.

Texas Government Code, §2001.029(a) provides an opportunity for the regulated community and public to comment on state agency rules. The commission values the opportunity to receive feedback from the public and regulated community regarding its rule proposals and it considers all comments that it receives. The commission made no change in response to this comment.

Hardin County WCID stated that agencies create rules and demands for information that will justify their existence and commented that the fees charged by the agencies are used to pay salaries to people sending out demands for information.

The agency carries out the responsibilities charged to it by the legislature and for certain programs, the EPA. Inherent in some of those responsibilities is the requirement to gather information from regulated entities. The agency has recently conducted a review of agency reports in an effort to reduce or eliminate unnecessary or duplicative reports and has also attempted to streamline the reporting requirements for regulated entities through the development of its electronic reporting systems. The commission made no change in response to this comment.

Agua SUD asked if the State of Texas could implement a statewide environmental tax to individuals and corporate Texas.

The commenter's suggestion of a statewide environmental tax is not within the authority granted to the commission by the legislature. Whether it could be implemented by any other state governmental body is outside the scope of this rulemaking. The commission made no change in response to this comment.

Agua SUD requested that the commission advise all Texans that there will be an increase in their bills to facilitate providing operating funds for the TCEQ and set up manned hotlines to explain to Texans the reasons for the increases. Agua SUD stated that this would let utility customers know that it would be pointless to argue the fee increases with their local providers.

To assist potentially affected fee payers in planning for their FY 2010 budgets the commission established a Web page that provided information about the proposed fee changes. The link to the Web page is: *http://www.tceq.state.tx.us/agency/waterfees.html.*

This Web page can be used as a resource for utilities that receive phone calls from their customers with questions about the fee increases. The commission made no change in response to this comment.

Shin-Etsu commented that the shock of such a fee increase would have immediate negative impacts on the company and would compromise the company's ability to pay future fees to the TCEQ.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue the same level of water program activities. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company. The commission made no change in response to this comment.

Mayor Branson and Carrollton, Public Works Department commented that automatically assuming a utility's ability to pass on the fee and declare no fiscal impact does not reflect reality. Carrollton, Public Works Department stated that both their city's util-

ity providers typically increase their rates annually; that they are faced with replacing aging infrastructure at a reasonable level; and, that approximately 10% of its customers pay the minimum rates because of limited incomes and can be financially challenged by these numerous demands on utility rates. Mayor Branson commented that water rates and the affluence of the customer base vary widely throughout the state and even within counties and that not all utilities will be able to easily pass on the increase. Mayor Branson also noted that proposed Senate Bill (SB) 2316 and HB 1433 allow an increased cap from $75,000 to $200,000 so there is a likelihood of further fee increases in the near future which will put additional budget pressures on utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The numbers presented in the commission's rule proposal were based upon a worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap, and that the agency would receive no general revenue. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost on to utility customers. The agency acknowledges the financial impact of imposing fee increases and the financial burden it can place on customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Luminant commented that because the multiplier is part of the regulation, it cannot be readily used to make adjustments in fees collected, and any change in the value must go through the rulemaking process. Luminant stated that as a participant in the stakeholders group for the last major wastewater fee adjustments, Luminant was led to understand that the multiplier was in place to allow for adjustment of revenue without changes to the fee structure. Luminant commented that this now is clearly not the case; and the multiplier concept should be either left at 1.0 or deleted as it is neither necessary nor useful. Luminant stated that a fee structure should be well reasoned and clearly stated, without the need of a multiplier because this would allow the regulated community to evaluate the true impact of any increase.

The multiplier allows the commission to adjust fees across the board without adjusting fee rates on the individual parameters. The multiplier is necessary for the agency to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative actions regarding agency appropriations. The agency has placed a provision in the rules requiring that as part of the operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

As an example of its fiscal responsibilities, Grandview referred to the creation of the proposed Prairie land Groundwater Management district as a potential solution toward addressing the depletion of our aquifers. Grandview stated that the $.30 per thousand gallons for the water it must pump from the Trinity Aquifers to address the needs of our citizens must be passed on to them as a surcharge and that a coupled with other fees proposed for TCEQ Grandview is facing a significant fiscal impact on this small city.

Grandview's suggestion regarding the creation of the Prairie land Groundwater Management District is not within the scope of this rulemaking. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to these comments.

Lake Corpus Christi RV commented that it sees no need for any additional fees when we all own our own wells and water rights. Lake Corpus Christi RV commented that it believes the state is exceeding its authority in mandating such fees other than the monthly well sampling.

Federal and state laws require the commission to carry out specific tasks to protect the state's water resources. The commission is responsible for ensuring clean, reliable supplies of water to support the needs of the state. In order for the commission to ensure a clean and reliable supply of water, the commission must check, evaluate, and address water quality and quantity which requires the commission to incur expenses related to personnel, equipment, laboratory, travel and data management. The commission's authority to establish fees in this rulemaking can be found in TWC, §§5.701, 26.0135, and 26.0291 and also in Texas Health and Safety Code, §341.041. The commission made no change in response to this comment.

Cleburne commented that there has to be some accountability for the services rendered to justify such a large increase in cost.

Over the last several years, the agency has reviewed its water program activities and made efforts to streamline processes and to use technology that provides efficiencies. However, water program activities have not received sufficient funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue it would be required to cut program activities.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The commission made no change in response to this comment.

One individual commented that state resources have been wasted on politically motivated regulatory and propaganda activities and that this shows there is more money presently available.

The commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws. In implementing the programs and activities required under these laws, the commission has

attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. These reviews consistently reveal that additional resources are needed and that extra funding is not available. The commission made no change in response to this comment.

One individual commented that a way to reduce spending is to eliminate TCEQ regulatory activity that exceeds EPA guidelines.

The commission must comply with both state and federal environmental laws. This rulemaking affects the CWQ fee, PHS fee, and WUF. These fees come from the following areas within the agency, respectively: the Water Quality Division, the Water Supply Division, and the Water Quality Planning Division. These divisions implement both state and federal laws. The commission made no change in response to this comment.

Wylie asked if the TCEQ is operating as efficiently as it can to perform its delivery of services and whether water purveyors would see an increase in services or assistance provided by this fee increase.

The commission has attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. The fee increases are necessary to allow the commission to continue providing the current level of water program activities and will not result in additional services. The commission made no change in response to this comment.

The Sierra Club commented that until the legislature adjusts the $5,000 cap for aquaculture facilities and the $75,000 cap for all other facilities, it will place a significant burden on some small operators and businesses; however, by making the proposed rule flexible and referring to the statutory cap, it will allow TCEQ to adjust fees if the cap is raised.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

GBRA commented that the alternative fee increase rule proposal effectively places most if not all of the commission's costs solely on the backs of those citizens who receive services from municipal water and wastewater systems.

While the proposed fee rate increases will affect citizens who receive services from municipal water and wastewater systems, the agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one group of fee payers. The increase is not projected to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not anticipated to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works requested more information as to why the overall financial obligations of Account 153 have increased. Plainview Public Works asked whether the financial obligations are increasing because of impacts in the large growth centers in Texas and whether these growth centers should be funding the new financial needs in Account 153.

Over the past two budget cycles, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. During the same time period the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. The commission has been using the Account 153 fund balance to cover the water fee revenue shortfall. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The need for additional revenue is not related to impacts of large growth centers in Texas. The commission made no change in response to this comment.

Plainview Public Works commented that there is a paragraph on the commission's water fees Web site that has a partial list of programs that the Account 153 supports and asked if any of these programs can be identified as having an inordinate impact on TCEQ accounts.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB recognizes that the uses to which certain water program fees may be applied was broadened by statute in 2001 but commented that there remain practical limits to the ability of an agency to establish the level of an administrative fee. TAB commented that there must be some reasonable relationship between the fee and the costs incurred or benefit received by the entity paying the fee. TAB stated that a fee that bears no reasonable relationship to cost or benefit ceases to be a fee and becomes a tax.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This rulemaking does not create a tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no change in response to comments.

SAWS commented that the fee increases are extreme. SAWS gave the example that its fee increase for the PHS fee and the CWQ fee is $1.1 million, or $1.4 million dollars with an increase in the cap, and would equate to SAWS funding the full-time loaded salaries of 23.6 full time equivalents or over 49,000 man hours a year. Houston commented that the proposed fee increases for the PHS fee and the CWQ fee will be about $3 million dollars or almost 1% of its operating and maintenance budget. Houston commented that this fee increase does not make any logical sense.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html.* The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

While the fee increases are significant, over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to these comments.

Wylie commented that its PHS fee would go up to $24,598.15 per year from the current $4,892.65 per year rate which is an increase of nearly 500%. Wylie asked why there is such a drastic increase all at once.

Over the past several years the commission has made it widely known what the impact of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes. Account 153 has always depended on general revenue and when general revenue appropriations were reduced two bienniums ago the agency had to use the fund balance to maintain program operations. Because the Account 153 fund balance is nearly depleted the agency needs to raise the full amount of funding. The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works commented that it would like more information as to the actual fee increase specific to Plainview. Plainview Public Works stated that, using the information provided by the commission, the proposed fee increase for Plainview would be 136% on the CWQ fee and 374% on the PHS fee. Plainview Public Works requests confirmation of these numbers.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html.* The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap, and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

WEAT commented that with the current statutory cap on the CWQ fee, any change in the fee structure to increase fees will place the burden on small to medium-sized dischargers not currently at the cap. WEAT commented that this increase will, in turn, be passed on to rate-payers.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact

of the fees is spread more broadly across the group of fee payers and will lessen the burden to some extent for those fees that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

LCRA commented that if the proposed rule is adopted its current fee amounts would nearly double and that if pending legislation is passed raising the fee cap to $200,000, then the LCRA's total fee amounts would nearly triple.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The fee revenue needs to be sufficient to meet Account 153 appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Odessa commented that under the proposed rule the fee for services to its drinking water systems would increase from approximately $13,000 to $82,000 and that the annual fee associated with the wastewater permit would increase from $53,410 to $75,000 (or $82,107 if HB 1433 passes removing the $75,000 cap) Cleburne commented that the magnitude of impact associated with the rule is extreme. Cleburne commented that under the proposed rule its PHS fees would increase five to ten fold and the CWQ fees would increase 20 to 25 fold and that this type of increase is significant for a municipality of its size. Denton commented that under the proposed rule its PHS fee will increase by a factor of seven from $12,280.79 to $85,579.00. GBRA commented that it does not support the proposed increase in regulatory fees due to the magnitude of the proposed increases and the effect on GBRA's water and wastewater customers who ultimately must pay the increased costs. GBRA listed its fees and showed that its CWQ fee would increase by 92%; its PHS fee would increase by 121%; and its WUF fee would increase by 284%. Arlington Water Utilities commented that for the PHS fee and the WUF fee they will face a single year increase of $202,515 or 745%. Sugar Land commented that based on the maximum potential fees it would be facing increases roughly totaling $102,000 and $45,000 for its CWQ fee and PHS fee, respectively. Sugar Land stated that compared to previous years, this represents over a 300% increase in fees as well as a substantially larger payment in absolute terms. El Paso commented that the commission cannot ignore the total impact of their proposal to raise both the CWQ fee and the PHS fee. For example, El Paso stated, their proposed PHS fee would increase from $37,050 to a staggering $397,176 or result in nearly a 1,000% increase. Further, El Paso stated, their proposed combined increase in water and wastewater fees would go from $265,838 to $1,008,972 or an increase of $743,134 per year.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html.* The commission made no change in response to this comment.

Northeast Texas MWD noted pending legislation to raise the cap from $75,000 to $200,000 and stated that an entity staying at the cap maximum would experience an increase factor of 2.67. Northeast Texas MWD commented that smaller systems would bear the burden of the fee increase and cited itself as an example stating that under the same scenario it would experience an increase factor of 3.58.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that

were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

AEP stated that their fees will be increased by 56% to 235% for six out of the seven AEP-owned power plants in Texas with water quality permits and that these amounts will increase substantially if a multiplier is applied in the future. AEP commented that TCEQ may be under the impression that the cost increase can be passed along to our customers; however, rate increases for the utility industry are long and complex processes that can take years.

The commission acknowledges that these fee increases are significant and that certain entities may need prior regulatory approval before passing costs on to their customers; however, without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html.* The agency built into this rule the ability to modify rates to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative action regarding agency appropriations. The commission made no change in response to this comment.

AEP expressed concern that the fee for uncontaminated flow increased by 80%, the largest percentage increase of all the fees. AEP stated that many of our facilities use a once-through cooling water system that discharges high volumes of uncontaminated flow. AEP commented that this fee increase appears to disproportionately affect the electric utility industry considering many power plants in the state use this technology. AEP commented that uncontaminated flow does not have a significant impact on the environment and should not be subjected to the largest percentage increase. NRG commented that while the fee increases in Chapter 21 ranged from 53% for traditional pollutants to 56% for contaminated flows, storm water, toxicity, and major facility designation there did not appear to be a basis for the increase of uncontaminated flows to 80%. NRG suggested that this fee increase be consistent with the other fee increases. AECT commented that there is inadequate justification for the fee rate for uncontaminated flow to be increased by 80%, when the fee rates for the other discharges listed in §21.3(b)(5) would only increase by a little over 50%, especially since most of the other types of discharges involve discharges of contaminated wastewater. AECT commented that proposed 80% increase in the fee rate for uncontaminated flow would disproportionately affect power plants that use once through cooling water systems because such systems generate significant volumes of uncontaminated flow. Luminant commented that the proposed increase of 80% for uncontaminated flow found in §21.3(b)(5)(B) is the greatest concern and appears to be both excessive and disproportionate. Luminant stated that uncontaminated flow is just that; uncontaminated and that for the electric generating industry this flow typically consists of noncontact cooling water, which is the most water conserving method available. Luminant also stated that in many cases the water is taken from, and returned for reuse, to an industrial cooling impoundment specifically built for that purpose and that by definition it has the least impact to water quality. Luminant concluded that for these reasons, it is inappropriate to impose such a dramatic increase on the one category classified as uncontaminated. Luminant also noted that this particular category is virtually industry specific, and will have a disproportionate significant impact on the electric utility industry.

The commission acknowledges that there is a difference between uncontaminated and contaminated flows, and this difference is reflected in the rates for each of these factors. In an effort to have all categories of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%. Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rates for that factor increased at a greater percentage than the average. This rulemaking affects all entities with uncontaminated discharges, not just electric generation facilities. The general revenue appropriation in addition to the changes in the cap for the CWQ fee will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no changes in response to these comments.

Talty WSC commented that its rate will be going up from $0.70 to $2.15 and that is more than three times the old rate and that it does not believe that there has been adequate time for water systems to prepare for this increase (along with the many other increases we receive).

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The agency has made great efforts to provide notice of possible fee increases as soon as possible to allow fee payers sufficient time to include such information in their budgeting processes. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Kempner WSC understands that six years without an increase in fees is too long. However, Kempner WSC commented that it appears that the six-year time period is being used to not only catch up on lax oversight but to inflate the increases as well. Kempner WSC stated that almost all of the fees are being doubled and in many cases a hundred fold and in some much more than that.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water pro-

gram activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

El Paso commented that the impact of these fees is substantial. For example, El Paso stated, the amount of monies needed to meet the fees could fund 20 water and wastewater operators or could finance a much needed $10 million in capital projects.

A utility investing in its staff and infrastructure is desirable and the commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The commission is required to follow and to enforce state and federal environmental laws and must raise its fees to be able to conduct water program activities as required by these laws. The commission made no change in response to this comment.

Rosenberg commented that it strongly disagrees with the proposed fees and recommend the fees be left at their current amounts for at least an additional two-year period. Rosenberg suggested that after the two-year delay, fee increases should be gradually implemented over a period of years. TCC stated that the preamble to the rule notes that fees have not increased since 2002. TCC commented that inflation would have increased the fees at the facilities that pay the CWQ fee by an average of approximately $5,900 per facility (source Department of Labor CPI calculator). TCC stated that such dramatic fee increases in a single budget year represent an unwelcome surprise which is exacerbated by increasing the fee during the current budget year. TCC recommended that any fee increase should be phased in so that such dramatic increases are not incurred in a single year and timed such that entities on a calendar FY have adequate notice for budgeting purposes. TCC suggested that a phase in between the years of 2010 and 2015 would provide for more adequate notice. Calpine stated that the budgeting process for municipalities and industrial regulated entities generally begins during the prior calendar and/or FY. For example, Calpine stated, the CWQ fees for the TCEQ FY 2010, which will be invoiced in October 2009, were budgeted by Calpine in August/September 2008. Calpine commented that any fee increase that is implemented for TCEQ FY 2010 will result in a budget variance at each affected facility. Calpine suggested that the commission could defer the rate increase until at least TCEQ FY 2011 allowing regulated entities adequate time to budget for the change or stagger the implementation over a period of years to minimize the effect of a large percentage increase in fees. Houston commented that the timing of the proposed rule is not good and that not giving all utilities at least one year to plan for the increases would be a burden. Cleburne commented that the proposed increase is not staggered in any manner and fails to recognize budgetary limitations and rate increase requirements that may have to be imposed just to collect these fees. Agua SUD asked if the commission could review its operating costs and improvements annually and increase their costs accordingly over five to ten years. Agua SUD also commented that the commission should reevaluate immediate needs and future projected needs and then increase costs annually over time so that rate payers can adjust their budgets to the increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommend a phased-in approach with ample time for input from the public and the utilities for increasing fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that raising fees by a factor of three in a single increase is too much at one time for most small systems to bear. LCRA requested that the TCEQ consider implementing the fee increase in a phased-in approach to allow adequate time for LCRA and other affected entities to undertake rate increases and incorporate the new fees into their respective FY budgeting. Wylie asked if the fee increase could be phased in gradually over successive years to allow entities to gradually adjust to and adequately plan for changes. Austin and Luminant commented that the increase in fees should take a phased-in approach. The Utilities and Denton commented that when the time comes for TCEQ to increase fees, it should do so in a phased-in approach with ample time for input from the public and the utilities. The Utilities and Denton commented that cities and local governments typically increase rates in a phased-in approach, and the TCEQ should follow that same lead. Shin-Etsu commented that such a substantial increase in fee should be phased in gradually over a span of years instead of implemented immediately. Talty WSC does not believe that the water system should suffer for poor planning on the part of TCEQ and suggested that these rates should have been increased gradually since 2001 not taken all at once. El Paso requested that the implementation of the fees be phased in over five years. Sugar Land commented that rather than being phased in, the proposed rules would represent an immediate, appreciable increase. Sugar Land stated that municipalities across the state are already dealing with various other increases related to rising cost of materials, regulatory mandates (e.g. implementation of groundwater conservation districts/subsidence districts) and other factors. Sugar Land encouraged the commission to review the extent of the fee increases and the method by which they are determined from year to year and recommended a phased increase in revenue based on a set fee structure to reduce the impact to local governments and their customers.

The fund balance in Account 153 is inadequate to allow the commission to implement a phased-in approach. Current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of water program activities in FY 2010 - 2011 as it is currently performing. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Arlington Water Utilities opposes the single year large increase especially at a time when all cities are faced with shrinking revenues due to the economic conditions. Arlington Water Utilities commented that when program funding increases are needed, regardless of the source of funding, the increases should be programmed to avoid the shock of very large single year increases. Arlington Water Utilities stated that it pursues a very proactive operational and capital planning system to ensure that the annual cash flows and the periodic rate and tax increases will not unnecessarily and adversely impact the citizens of Arlington in a single year and urges the commission to adopt a similar approach to its program planning.

The commission recognizes the value of prior planning and appreciates the proactive approach of Arlington and other regulated entities. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. Over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require either fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to inform them that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

TCC commented that the two bills introduced in the House and the Senate set the maximum fee limit at $200,000 which represents up to a $125,000 increase (or 167% increase) from the current cap. TCC noted that if a facility remains capped this $125,000 increase would occur in a single year. TCC commented that if the statutory limit is increased, a phased implementation approach should be used to graduate towards the revised statutory limit so that such a large increase does not occur in a single billing cycle.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. In addition to general revenue appropriations, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

TCC stated that the timing of the decision on fee rates is critical for regulated entities so that appropriate budgeting decisions can be made. TCC stated that for those regulated entities on a calendar FY, the current state billing cycle, which marks October as the beginning of the FY, is very problematic for timely budgeting. TCC recommended that the TCEQ move the billing period for the water quality fees to the first quarter of the calendar year (second quarter of the State of Texas FY) to allow a greater flexibility for all regulated entities to budget appropriately. TCC commented that for entities on a calendar FY increases in the CWQ fee present an additional burden because the substantial increase over budget is incurred in the current FY since the TCEQ bills these fees in October at the beginning of the State of Texas' FY.

The agency depends on the revenue from the CWQ account to maintain the budget through the early months of the FY. It is not financially feasible to modify the bill date due to nature of the agency's budget cycle. The agency would have been insufficiently funded in the early months of the FY if the fee increase did not take place when planned and would not have been able to perform the same level of water program activities as it is currently providing. The commission made no change to the rule in response to this comment.

Odessa commented that it opposes the proposed dramatic increase in fees because cities are already dealing with the increasing costs related to chemicals, electricity, maintaining qualified personnel, compliance with regulations, and failing infrastructure. Odessa commented that as an enterprise fund, it will

have no choice but to pass all of these increased costs on to our utility customers, many of whom are dealing with the impacts of the recession. AECT suggested that at a time when businesses are under significant economic pressure and uncertainty the TCEQ's proposal to increase water fees needs to involve serious consideration of possible ways to reduce the proposed magnitude of the increases in water fees. EI Paso recognized the need for the commission to increase fees but commented that at this time it is not practical for the utility to raise rates to cover these expenses because of both political and economic realities. Rosenberg commented that because of the recent economic downturn the city is not in a position to consider increasing rates to cover the proposed fee increases and that it does not make good economic sense to increase fees at this time. Rosenberg suggested that the commission seek a fee increase after the economy fully recovers and ratepayers again have some disposable income available. Agua SUD stated that it understands the reasons for the increases and stated that the commission performs a valuable service to all of Texas, but commented that these increases are difficult to implement from one day to the next. Sugar Land commented that the economic downturn has led to decreasing system revenues and budget shortfalls and that such a marked increase in regulatory fees in a time when resources are already stretched thin represents an untenable situation. One individual commented that in this bad economic time people have to prioritize and reduce spending and the individual believes that the commission should follow this example. Wylie commented that municipalities are being adversely affected by the current economic status of the nation and that the PHS fee increase represents a substantial impact on the Water Division's annual budget at a time when economic conditions require that we operate as frugally and efficiently as possible while still meeting all the requirements to deliver potable water to our customers. Austin commented that the time is not right for such a dramatic increase in fees in these times of economic hardship when their customers are losing jobs or have had to take pay cuts. Houston commented about the timing of the rule during an economy when people across their city and across the state are losing jobs and stated that it would have a negative impact on Houston and other cities in the state. Valley Mobile Home commented that in this time of economic stress in our country and our state that the commission needs to tighten its belt like the rest of us and not increase any fees at least until things get back to normal. Valley Mobile Home suggested that the commission join in the spirit and cut salaries to help out. Kamira commented that this is absolutely the wrong time to do this and that TCEQ and the State of Texas should follow the example of families and cut back on something. Kamira requested that the commission instead decrease fees through lay offs or decreased reporting to the agency and get in line with the problems the general public is going through in this time of economic instability. Kamira stated that the fee increase will lead to the water system providing less customer service and a negative opinion of the commission. Kempner WSC commented that these fees are not justified and must be reevaluated particularly with the current economic situation. SEC commented that the last thing we need is more fees in a depressed economy. Shin-Etsu objects to the increase in fees because of the inappropriate timing of the increase as well as lack of tangible benefits to the fee payer. Jefferson stated that it understand the TCEQ has refused to explore reducing costs and commented that TCEQ should look closely to reduce its costs like every other governmental entity in Texas.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, federal and state laws to which the commission is subject require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, electronic discharge monitoring reports (eDMR), and automated internal processes.

The commission has a publication, *Funding Sources for Utilities,* RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at *mtaunton@tecq.state.tx.us.* Additionally, small businesses and small local governments can contact the agency's Small Business and Environmental Assistance Division for compliance assistance at (800) 447-2827. The commission made no change in response to this comment.

UGRA asked that given the state of the economy the commission consider maintaining the status quo on fees for the foreseeable future. UGRA stated that any increase in fees will ultimately impact the consumer who is already reeling from economic blows. UGRA asked that the commission consider alternative fiscal management strategies that do not require fee increases.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, federal and state laws to which the commission is subject require that the commission carry out specific tasks to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting and eDMR as well as automating internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

The Utilities and Denton commented that cities are facing budgets cuts, decline of local business activity, a freeze on filling vacant positions, and other factors that combine to make the budget process a challenge for cities and water utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic sit-

uation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Luminant commented that the proposal seems premature, since the legislature is currently in session, appropriations have not been set, and there are a number of related bills under consideration. El Paso requested that the commission consider the timing of implementing any new fees. El Paso stated that it is their understanding that the fees would be implemented in August which is half way through their FY and as such have not budgeted for any fee increase this FY. El Paso requested that the proposed increase not begin until all utilities have had a chance to adjust their budgets for their next FY budget. Luminant commented that the timing is atrocious from a budgetary standpoint and that it is inappropriate to impose a dramatic increase within a budgetary year.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. Waiting until after the session would not have given these entities any advance notice of and, therefore, no ability to plan for increased fees for their FY 2010 budget cycle. The commission wanted to provide as much notice as possible for potentially affected fee payers as they moved through their budget planning cycles.

The CWQ fee bills will be mailed in October 2009 with the PHS fee bills following in November and the WUF bills being mailed in January 2010.

The commission is raising fees at this time because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of service for its water program activities in FY 2010 - 2011 as it is currently performing. Without the additional fee revenue, it would be required to cut program activities. This could affect, for example, permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and reducing the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

Taylor Landing commented that a further increase, unjustified by improved services, is unwarranted and suggested that governmental agencies, including TCEQ, start tightening their belts and live within their budgets like everyone else. Taylor Landing suggested that the solution to the commission's need for more funding is not to increase user fees, rather, it is to decrease operating expenses. Shin-Etsu would prefer to see the services and obligations of the TCEQ decrease before significantly raising the fees in dismal economic times.

Over the past several years, the agency has reviewed its water program activities and made significant efforts to streamline processes and to use technologies to create greater efficiency. Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. The agency will continue to develop more efficient processes.

Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in its water fee rates, the agency would not be able to maintain its current level of water program activities. The commission made no change in response to this comment.

Plainview Public Works asked if the greatest impacts to TCEQ funding be more accurately identified and addressed before everyone in the state is asked to contribute more money for the same service. Odessa commented that increases in fees for all 30 of the fee funds in Account 153 should be considered, rather than placing the burden of the budget shortfall on the three of the 30 funds previously listed. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD stated that TCEQ informed them that there are 30 or more fees that support the TCEQ but only three were chosen for massive increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD support looking at all of the fees for equitable increase not just the ones in the current rule package. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it believes that at least some legislators recognize that legislation is a necessary part of this proposed rule package given the filing of bills to increase the cap limits. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that since legislative action will be needed to achieve a proper balance, it seems more prudent to look at all fees not just the three in the current proposal. The Utilities and Denton suggested that TCEQ further evaluate all 30 fees for potential increases, even those requiring statutory change, in an effort to spread the impact among those entities bearing the cost of TCEQ funded water-related programs. Luminant commented that the new revenue raised by the fees in this rule proposal may not go to support the programs related to the targeted revenue stream and will result in an inequitable burden on those who are part of that targeted revenue stream.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to those fees are outside of the commission's direct control and also the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-re-

lated activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Cleburne commented that there are insufficient checks in the operating budget for the commission to ensure that only the amount of fees absolutely necessary to operate will be collected. Cleburne commented that there are many programs that will be subsidized by this fee increase that do not appear to benefit the city.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The amount of general revenue and Account 153 funds appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, added statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

Carrollton, Public Works Department asked that the commission reconsider the proposal and that the commission reengage with the Texas Legislature to increase their appropriations' support for these critical programs. Carrollton, Public Works Department commented that they realize this may be difficult so they also suggest that the commission comprehensively address all the water programs' budgetary needs and ask for statutory rate relief in all those needed to pay their own way. Mayor Branson recommended that the commission accurately forecast the appropriate budget shortfalls in each of the 30+ water program service fees and ask for statutory fee relief within each program.

The commission has sufficient appropriation authority to manage its water programs. The shortage is the amount of fee revenue collected by the agency. The current fee revenue deposited into Account 153 does not support the appropriations and obligations from the fund; therefore, an increase in fee rates is necessary to support current appropriations from the fund. The amount of general revenue received by the agency is determined by the legislature. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The fees in this rule will impact the majority of water fee payers throughout the state. Other fees were not selected because they do not generate enough revenue to impact the shortfall and do not have as consistent revenue streams. The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

AECT commented that any necessary increases in water fees should be assessed equitably across all fee payer sectors. By that, AECT means that the water fees for a fee payer sector should be based on the agency resources that are needed for management of the water quality programs for that sector.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The fees in this rule will impact a broad segment of regulated entities throughout the state. The commission made no change in response to this comment.

Carrollton, Public Works Department recommended that the appropriate solution is that budget shortfalls should be proportionally spread between all the water programs that can't cover their forecasted bills. Mayor Branson and Carrollton, Public Works Department stated that continuing down the proposed path will distort the relationship between actual costs of the program and the fees to recoup those costs. Carrollton, Public Works Department commented that this will likely also affect organizational assessments to review operational effectiveness and cost efficiencies.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. The commission made no change in response to this comment.

Mayor Branson commented that if not tax supported, each program should pay its own way. Mayor Branson and Carrollton Public Works Department commented that the city must pay for the services used but the water programs the city doesn't use should not be part of our city's obligation. Lake Corpus Christi RV commented that the fees seem like an attempt to support shortcomings of other departments.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

SAWS recommended that the legislature keep funding the commission with general revenue while the following items are considered: a phased-in approach to the fee increase and that any increase in fee structure be designed to equitably spread the burden across all water-related programs and activities or identify target increases based on the sum. SAWS asked that it be clearly demonstrated that the fees go to the programs they are intended to cover.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

At this time, the commission does not have an adequate fund balance in Account 153 to implement a phased-in approach because the past two bienniums have depleted the fund balance. The current fee revenue is not sufficient to support current appropriations from Account 153 and unless the commission raises water fee rates the agency will not be able to perform the current level of water program activities.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this statutory authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB commented that it is appropriate that the commission consider whether those businesses that hold wastewater permits that would be subject to significant fee increases truly impose a cost on the agency or receive a benefit from the commission's performance of its regulatory activities equivalent to an annual cost of conceivably $200,000. Absent such a finding, it is the position of TAB that further adjustments in other fees, including the PHS fee, be considered because it is clearly the most broadly based and it comes the closest to functioning like the general revenue that is no longer included in the TCEQ budget. TAB commented that if the legislature allocates little general revenue to TCEQ water programs, it should be incumbent on the agency to maximize the collection of needed revenue from the source that most closely resembles general revenue.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. The fee increase is intended to provide enough funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no changes in response to this rule.

Rosenberg suggested that the commission ask the legislature to provide additional funding or that the agency perform a top to bottom review and eliminate expenditures to overcome the projected shortfalls, like local governments.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are

used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, and eDMR, and as well as automating internal processes. However, water program activities have not been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it will be required to cut program activities. The commission made no change in response to this comment.

Odessa commented that all taxpayers receive benefits through water and wastewater services; therefore, Odessa suggested that the TCEQ strongly consider financing their budgetary shortfall, at least in part, through Texas general fund revenues and any available federal funds.

The agency is currently using federal funds to support water programs and these funds were taken into consideration by the commission when developing the fee increases. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

Calpine commented that given the $75,000 statutory cap on the CWQ fee, any increase in the fee would be absorbed solely by regulated entities currently paying less than the cap. Calpine suggested that the commission could continue to lobby the legislature to approve an increase to the current cap (i.e. HB 1433 and SB 2316); encourage the legislature to reinstate the original water quality program funding for Account 153; or, delay adoption of any fee increase until the legislative session has ended and all associated changes have been evaluated.

Since the cap is set in the TWC and cannot be changed without legislative action the commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. The commission provided information to both the Texas House and Senate during the 81st Legislative Session regarding the impacts of raising the CWQ fee cap. The agency has also worked with the legislature to determine general revenue appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Mayor Branson commented that the Texas Legislature should provide required appropriations for a critical state service and not progressively reduce support, but understands that the legislature has this right. GBRA does support an increase in the commission's funding but through increased general fund appropriations rather than increased regulatory fees. GBRA believes this approach is much more fair and appropriate since all the citizens of the state benefit from the commission's programs. TCC commented that since all Texans benefit from the commission's programs that a more equitable approach is to obtain significant funding from general revenue. TCC encouraged TCEQ to continue to seek funding commensurate with historic funding levels from general revenue given the benefits to the citizens and the economy of the state. Arlington Water Utilities commented that all citizens of the state benefit from the water and wastewater programs therefore Arlington Water Utilities urges the commission to consider a different approach than the historical user fee, namely funding the programs from the general revenue funds of Texas. Arlington Water Utilities urges the commission to work with the legislature to adopt methods to pay for the majority of the commission's water and wastewater programs out of the general revenues of Texas. LCRA requested that TCEQ delay adoption of the fee increase until after the legislative session, so that any general revenue that may be made available to TCEQ can be factored into determining the timing and level of necessary fee increase. LCRA stated that general revenue funding to supplement a reduced or phased-in fee increase would provide a more balanced approach to paying the cost of TCEQ programs by all Texans who benefit from these programs but are not subject to the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD believe that there is sound policy for making the general revenue the dominant funding source and the user fee the lower secondary source. Austin commented that the services that the commission provides to the state are beneficial and should be funded with the general relief fund with supplemental funding coming from the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that the current proposal is not likely to strike the proper balance between general revenue that is used to fund the TCEQ and fees that are used to fund the TCEQ.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

In proposing increases to the PHS fee, the CWQ fee, and the WUF, the agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to un-

duly impact any one group of fee payers. The fee increases in this rule will be used to protect the water resources of the state and were developed as the most effective way for the agency to adjust revenue levels while spreading the financial burden as equitably as possible among those who benefit from clean and reliable water resources. The commission made no change in response to this comment.

AEP requests that the TCEQ explore all possible sources of funding for its water program. AEP asks that the TCEQ make an effort to convince the Texas Legislature to provide as much general revenue funding as possible for Account 153. AEP also requests that the TCEQ request additional funding from the EPA if this has not already been done. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommended that the Texas Legislature appropriate the proper level of funding and that all fee increases be reviewed legislatively to assure a proper funding balance. The Utilities and Denton commented that it is their position that a more balanced approach for underwriting the cost of the TCEQ to carry out these valuable programs should come from the Texas general revenue funds and supplemental federal funds, such as the Safe Drinking Water Act grants, rather than specific use fees. Rosenberg commented that the commission should seek additional funding from the federal government to carry out the various EPA mandates being handed down. The Utilities and Denton commented that it makes more sense than the current rule proposal to reprioritize and reallocate existing general revenue and federal funds that assign a higher priority to the protection of the public health and the viability of the Texas economy. The Utilities and Denton commented that the general revenue funding stream should account for the majority of the TCEQ water program funding, with fees only as a supplemental source.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Collectively, the water programs of the commission protect public health by ensuring clean and adequate water supplies. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company.

The commenter also suggested that the agency request funds from the EPA to support its water program activities. The commission does seek and receive federal funds from EPA; however, such funds are not sufficient to cover agency programs. The commission made no change in response to these comments.

Brownwood stated that the state and federal government want to put limits on how much utilities can tax and charge for fees and asked what will happen to utilities if a utility's fees to the state are increased and its ability to charge what is needed to maintain its own utilities is reduced. Brownwood commented that TCEQ needs to cut its costs and have the legislature fund the TCEQ back to its original level.

The commission is not aware of any initiative from either the state or federal government that would put limits on how much utilities can tax and charge for fees. Section 291.31 of the commission's rules allows a utility to charge reasonable and necessary expenses for rendering service to rate payers. It is anticipated that to the extent affected fee payers need to increase rates to their customers through a tariff change, such change could be requested pursuant to §291.21(b)(2)(A)(iv), which authorizes the executive director to approve minor tariff changes in certain instances based on governmental requirements beyond the utility's control.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has implemented electronic processes including electronic permitting, eDMRs, and automated internal processes.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The commission made no change in response to these comments.

WEAT supports full funding of the TCEQ water quality programs and fully supports the agency's attempt to provide for full funding of these programs. However, WEAT believes that CWQ fees should remain at the current levels and the balance of funds needed for agency water quality programs should come from general revenue appropriated by the Texas Legislature.

The commission acknowledges the comment in support of the agency's attempt to provide full funding to its water programs.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

One individual commented without the past five to ten years of records listing revenue streams and expenditures for the accounts requesting fee increases the reasoning behind a higher fee request simply looks like propaganda.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities as it is currently providing. The following information presents the funding breakdown between general revenue appropriation and water resource funding (includes fund balance and revenue) for the agency's water programs.

The agency received $59.5 million in general revenue funding and $45.7 million in Account 153 funding to fund the 2000 - 2001 water programs. The agency received $60.5 million in general revenue funding and $49.1 million in Account 153 funding to fund the 2002 - 2003 water programs. The agency received $54.5 million in general revenue funding and $50.3 million in Account 153 funding to fund the 2004 - 2005 water programs. The agency received $9.6 million in general revenue funding and $90.4 million in Account 153 funding to fund the 2006 - 2007 water programs. The agency received $20.7 million in general revenue funding and $90.2 million in Account 153 funding to fund the 2008 - 2009 water programs. The commission made no change in response to this comment.

Carrollton, Public Works Department is concerned about the proposed water program fee increases in the proposed rule, as well as pending legislation to further increase the CWQ fee cap. Carrollton, Public Works Department is supportive of the essential services provided by TCEQ for the water programs mandated by their roles and responsibilities but disagrees with the methodology and process currently proposed to meet Account 153 obligations.

This rule enables the agency to adjust fee rates according to the amount of general revenue and Account 153 appropriated to the commission for water programs. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

This rule will give the agency the ability to adjust rates to guarantee sufficient funding is available for the commission's water program activities. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to this comment.

Luminant acknowledges that there may be a need for some increase in fees, but disagrees strongly with the process used, the excessive increases proposed, and the inequality to the targeted fee payers. Luminant commented that without knowledge of the methodology used, it is difficult to dispute or support the increases proposed and that it is equally difficult to understand the disparity of the proposed increase by category. Therefore, Luminant requests that the commission: provide greater detail, clarity, and justification on current expenditure from Account 153; provide greater detail, clarity, and justification on the need for the proposed increases; provide greater detail and clarity on how the percentages were derived for each category; provide greater detail and clarity on how these increases in fees are distributed across the various groups of fee payers, and specifics on how the increased revenue will be used; equalize the percent increase across all wastewater categories, or provide justification on any variance to a standardized increase; set the fee structure at fixed amounts to allow a level of certainty for both the agency and the fee payers; and, keep the multiplier found in §21.3(b)(7) at 1.0 or remove it from the regulation as it is neither necessary nor useful.

The commenter asked for greater detail on current expenditures from Account 153. The environmental programs that the agency supports from Account 153 include: water permitting functions, Water Rights, Groundwater Protection, bays and estuary programs, TMDLs, water quality monitoring assessment/standards, wastewater, Clean Rivers Program, and Onsite Septic Systems. For the past two bienniums the agency has been appropriated approximately $90 million per biennium for its water programs.

The commenter requested greater detail on the need for the proposed increases. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The water programs have always depended on general revenue to supplement their costs. The general revenue appropriated to the commission for water programs have decreased from the 2004 - 2005 amounts. This rule will enable the commission to generate enough revenue from Account 153 to support water programs with the continued level of general revenue funding. This will allow the commission to maintain its current level of service for water programs. Persons interested in viewing historical information concerning the commission's operating budget can go to a Web page entitled Where the Money Goes at *http://www.window.state.tx.us/comptrol/expendlist/cashdrill.php.*

The commenter asked for greater detail about how the percentages were derived for each category. The fee rates for the proposed rule were based on a worst case projection requiring an additional $15 million annually from the CWQ fee and on the assumption that the agency would not receive any general revenue from the legislature.

The commenter asked for greater clarity regarding how the increases in fees will be distributed and how the revenue will be used. When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory au-

thority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The revenues will be used to make up the projected shortfall in the revenue to support the agency's water programs.

The commenter requested that the commission equalize the percent increase across all wastewater categories. The commission appreciates the desire to have any increase applied equally across all classes of fee payers. In an effort to have all classes of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%. Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rate for that factor increased at a greater percentage than the average. The amount applied to each factor will be determined by the annual appropriations and other costs from Account 153 and will be applied uniformly to all permits subject to the particular factor being applied.

The commenter asked that the commission set the fee structure at fixed amounts. The ranges set for each factor provide the commission the ability to adjust CWQ fee rates to the level needed to generate enough revenue to maintain its current level of water program activities. Fee rates will be set based on appropriations made to the commission and any adjustment to the cap made by the legislature. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The commenter asked that the commission keep the multiplier at one or remove it. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier to be applied in the upcoming FY. The commission made no change in response to these comments.

Cleburne commented that without more detail and specificity in the annual requirement, the city will have to plan for the largest potential fee to be collected each year and simply hope that the commission will adopt a budget that will not require such a large annual fee. Cleburne commented that this uncertainty in cost is not something the city can, or should budget for without greater certainty. Sugar Land commented that the change from a straight fee structure to a variable system whose only indicators are maximum potential costs, which are in turn subject to a variable multiplier, compounds existing budget issues. Sugar Land commented that this causes cities to try to budget for what are essentially moving targets. Sugar Land commented that variable fees require local governments to budget for the worst case scenario and that the opportunity costs of this process are potentially enormous as funds desperately needed for other projects are tied up for the potential worst case. Luminant commented that even if the fees are assessed at different rates from year to year, the entities that are part of the Water Quality Fee revenue stream will of necessity be forced to budget the maximum in anticipation of possible changes in the assessment. Luminant commented that this situation will not only increase their costs but will also introduce unwanted ambiguity to the ever tightening budget processes. Grandview commented that it is extremely difficult to adjust to the wide range of the possible fees. Grandview stated that as a municipality it must formulate a budget designed to meet its existing projected operation costs. Grandview stated that with a variance of up to four times the minimum to the possible maximum Grandview finds itself either under budgeting or over budgeting and imposing an unneeded increase on our rate payers. Grandview requested that the commission establish firm figures that would allow Grandview to project costs during its budget process.

Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive. The fee rates will be set at a rate that will generate sufficient revenue to meet operating needs. The commission recognizes the need for advance notice in the budgeting process and will work to let fee payers know what their rates will be as early as possible each biennium. The agency's overall water fund appropriations have been relatively constant the past few FYs and it is anticipated to remain so in the future. The consistency of appropriation would enable fee payers to determine their budget before rates are released in summer. The rates would only be impacted by significant changes to appropriations to the commission for its water programs. The commission made no change in response to this comment.

Sugar Land commented that while they understand the need to adequately fund the commission's various water programs, the extent of the costs and the variability of the rate structure in the proposed rules represent a significant unfunded mandate and budgetary impediment to local governments.

The commission recognizes the need for advance notice in the budgeting process and will work to let fee payers know what their rates will be as early as possible each biennium. The commission is taking action now to provide itself the flexibility to raise fees because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of service for its water program activities in FY 2010 - 2011 as it is currently providing. Without the additional fee revenue, it would be required to cut water program activities. The commission made no change in response to this comment.

Luminant stated that the background for the proposed rule states that it is the intent to eliminate the fixed dollar amount applied to each factor and replace it with a "maximum amount that could be assessed." Luminant fears and expects that the "maximum amount that could be assessed" will become the de facto rate.

The agency's authority to expend funds for its programs is limited to its appropriation authority granted by the legislature. For the CWQ, the agency replaced the fixed dollar amount with a range for each factor to enable the agency to adjust fee rates to respond to the amount of general revenue and Account 153 funds appropriated to the commission for its water programs. The amount assessed for each factor would be applied uniformly to all permits subject to the particular factor being applied. The commission made no change in response to this comment.

Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that if the rate must rise by 10% overall to generate the funding to cover the anticipated shortfall, then the burden of the 10% needed from an entity covered by an applicable cap will fall on the small utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that raising the cap by less than the amount of the percent of increase only shifts the burden to the small systems to raise more.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to $2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection.

Regarding the CWQ fee and WUF the cap is set in the TWC and cannot be changed without legislative action. The commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Northeast Texas MWD commented that the amendment to the formula for the WUF significantly impacts the providers in lowly-populated areas (rural) in water abundant areas. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that they believe that the small utility systems may be responsible for an inappropriately large proportion of budget funding due to the caps afforded large utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it is hard to accept why a preference would be shown to large systems to the detriment of the small systems.

The proposed WUF rate changes no longer include a price break for water right holders with larger water rights. Under the previous fee structure, larger water right holders received a lower overall fee rate per acre-foot than water right holders that were under the acre-foot threshold. The fee rate in this rule will treat all water right holders the same regardless of size.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Additionally, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

New Ulm WSC commented that it is a very small rural community and that existing fees and assessments are already a burden to our system and having these increase will make it more of a burden. New Ulm WSC requests that there be some type of adjustment for very small utility companies. Pleasanton requested that in setting fees the commission consider the size of the entity and number of customers. Pleasanton commented that if the rates go up for the smaller entities, such as the City of Pleasanton, they should go up proportionally for the larger ones. L&L commented that it manages five small water systems and they can not afford the increases and that fee increases are not necessary at this time. L&L also commented that fees are already too high for small water and wastewater providers.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to $2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection. This eliminated the possibility of larger utilities paying only $.11 per connection and placing a larger burden on smaller systems.

The commission has a publication, *Funding Sources for Utilities,* RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at *mtaunton@tecq.state.tx.us.* The commission made no change in response to this comment.

SAWS and the Utilities commented that it is opposed to these dramatic fee increases and believes that the large utilities will be responsible for an inappropriately large proportion of budget funding. As an example, the Utilities and Denton stated that the fiscal note with the Chapter 290 revisions states that 30 city-owned systems with more than 37,000 connections will account for $8.2 million of the overall $14.2 million increase in the current economic downturn and without the ability to clearly communicate an increase in public health benefits associated with the cost increase to customers. Denton believes that it will be responsible for an inappropriately large portion of budget funding.

The larger municipal utility providers account for 47% of the state's total PHS fee connections. Under this rule the larger municipal utilities will pay a fee that is based on the number of connections. This rule changes the complex formula that decreased the fee per connection cost as the number of connections increased. The previous formula-based system allowed the larger systems to only account for 18% of the total amount of fee assessment while serving 47% of the population. This rule simplifies the fee calculation for all water systems and does not require smaller systems to cover a higher percentage of cost in relation to larger systems. The commission made no change in response to this comment.

El Paso commented that the services it receives from the commission do not justify the level of the increase and that the commission seems to be using fees charged to big cities to cover other areas of value to the commission.

The fees in this rule are based on specific factors that are in a permit or authorization. Larger cities use more water resources and are therefore assessed more than smaller entities. The cost is being spread equally across the various fee payers based on permits or authorizations for water and wastewater.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

New Ulm asked that the commission consider not increasing the CWQ fee or the PHS fee.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do. The commission made no change in response to this comment.

El Paso requested that the commission lower the requested fee amount for both the CWQ fee and the PHS fee to a 100% increase over the current fees and that the commission support lowering the cap proposed in HB 1433 to a corresponding value.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Shilk commented that during bad economic times they did not agree with increasing any of the fees in the rule proposal. Shilk commented that increasing fees to encourage conservation is nothing more than a tax. Hardin County WCID commented that it does not see the value to the increased fees and that people did not have an opportunity to vote regarding the new fees which Hardin County WCID feels are hidden taxes. One individual commented that the fees are really taxes and that this is not a good time to ask for money when people's budgets are so stretched. Mayor Branson commented that the commission response to its budget shortfall of raising only three fees, converts what are now fees into taxes on the local government utility. Brownwood commented that the fact that TCEQ general revenue has declined causes utilities across the state concern because it looks like another way to increase tax revenue. Brownwood stated that general fund revenue is generally in form of a tax. Brownwood commented that raising the consolidated water quality fee is just a hidden tax.

This rulemaking does not create a new tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out is regulatory responsibilities related to its water programs. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. The fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

SAWS commented that the fee increase is not balanced. SAWS gave the example of a large 100 mgd wastewater treatment plant and a one mgd wastewater treatment plant and stated that there should be a lower unit cost calculated into the fees for those efficient systems.

The CWQ fee uses many factors in determining the fee amount. The factors include flow as well as the pollutant values assigned. One of the parameters is contaminated flow measured in mgd. A higher flow under this parameter equates to a higher fee assessed. The commission made no change in response to the comment.

Brownwood commented that it is concerned that increased fees will ensure the same level of service from TCEQ. Brownwood stated that as cities all over the nation look at their budgets in tough times, they look at funding essential services and cutting other non-essential services. Brownwood commented that the TCEQ and State of Texas should do the same. Brownwood commented that one program, for example, that is non-essential is the Industrial Pretreatment Program. Brownwood stated that utilities are already governed by a permit that sets standards for the utility's effluent discharge. Brownwood questioned why utilities that are already controlled by a permit must also have regulations to control effluent. Brownwood stated that this program cost utilities and industries hundreds of thousands of dollars each year to regulate effluent that is not causing a problem.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. However, water program activities have never been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient

processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants.

The commenter suggests that the commission eliminate nonessential activities and cites the Industrial Pretreatment Program as an example. The EPA delegated the pretreatment program to the commission's predecessor agency on September 14, 1998. As part of the delegation, the commission is required to operate and manage a program in accordance with 40 Code of Federal Regulations Part 403 to properly regulate publicly owned treatment works (POTWs). The pretreatment program is to prevent the introduction of pollutants into a POTW by industrial users that may interfere with, pass through, or contaminate the sludge since POTWs are not designed to treat toxics in industrial or even some commercial waste. To address discharges from industries to POTWs, EPA established the national pretreatment program as a component of the National Pollutant Discharge Elimination System permitting program to require industrial and commercial dischargers to treat or control pollutants in their wastewater prior to discharge to POTWs to prevent serious problems. The actual requirement for a POTW to develop and implement a local pretreatment program is a condition of its Texas Pollutant Discharge Elimination System wastewater discharge permit. The commission made no change in response to this comment.

While AEP understands the need for the agency to increase fees, AEP also contends that the proposed increases are higher than necessary. At a time when businesses are under significant economic pressure and uncertainty, AEP believes that the TCEQ's development of proposed rules to increase water fees under Chapter 21 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed. For example, AEP requests that the TCEQ conduct a formal audit of its water programs that are funded by Account 153 to ensure that such programs are being operated as fiscally efficient as possible.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. Over the last several years, the agency has reviewed its water program activities and has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it would be required to cut program activities. The commission made no change in response to this comment.

L&L suggested that TCEQ delegate some of its duties to the water conservation districts and let them regulate water quality, public health, and water use assessment. L&L commented that local control is the recommended process.

The commission does not have the authority to delegate duties to districts in the manner suggested. Additionally, water districts are only able to operate to the extent authorized under the TWC, other state statutes, or by a special act of the Texas Legislature. The TWC does not grant districts broad authority to regulate water quality, public health or water use assessment. The commission made no change in response to this comment.

Grandview commented that if the state imposes fees on local governments that the local government must either absorb or pass on to its end users then the state has created a fiscal impact. Grandview commented that it is not requiring more services from TCEQ and is quite comfortable in continuing to maintain the same fees for the same quality of service.

The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of water program activities in FY 2010 - 2011. General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. The commission made no change in response to this comment.

Fiscal Note

TML commented that the fiscal note produces an entirely new and outlandish result: no governmental action will ever impose a negative fiscal effect on any other unit of government. For example, TML stated that if the federal government were to place an unfunded mandate on the TCEQ, there would be no fiscal note because the TCEQ would simply increase fees, as it is now doing. Further, TML stated that if Congress were to place an unfunded mandate on the Texas Legislature, there would be no fiscal note because the legislature would simply raise taxes or fees paid by Texans.

The fiscal notes to the proposed rule published in the March 13, 2009, issue of the *Texas Register* stated that local governments would not see significant fiscal impacts. The commission assumed that municipal utilities would pass the cost of the increase along to its customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

TML commented that the purpose of a fiscal note is to quantify the amount of revenue that an affected unit (or units) of government would be forced to generate as the result of a proposed action. TML stated that the fiscal note in question clearly and utterly fails to do so.

The fiscal note to the proposed rule provided information on fee ranges for local government to allow them to determine their potential expenses. The fiscal note also provided local government information on estimated cost and percentages of increase along with the average increase for systems of different sizes. Additionally, the fiscal note contained similar information for businesses. Since there are approximately 10,000 fee payers affected by this rule, it is not feasible to list for each entity the specific impacts of the proposed fee rate changes. For specific information, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find contact information at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html.* The commission made no change in response to this comment.

§21.3. Fee Assessment.

AECT commented that at a time when businesses are under significant economic pressure and uncertainty, they believe that the

TCEQ's development of proposed rules to increase water fees under §21.3 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed under §21.3.

Over the last several years, the agency has reviewed its water program activities and has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations.

The commission reviewed all of the agency's water fees in order to determine how to meet its financial obligations for water-related activities beginning in FY 2010. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. These fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

Luminant is concerned about what it considers significant and random increases proposed for the fee categories; particularly in light of the proposed increase of the multiplier found in §21.3(b)(7). Luminant commented that either separately, or especially in combination, the proposed increases to the fees and/or the multiplier will result in a significant increase in the cost of producing electricity. Luminant commented that the multiplier found in §21.3(b)(7) is unnecessary and only serves to disguise the true cost of the fees. Luminant commented that the additional proposed 1.75% increase applied by the multiplier, when combined with the proposed increase of each category, actually results in an increase in the annual wastewater fees to Luminant of 223%. Luminant commented that by any standard, this is excessive.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a $30 million shortfall, no change from the $75,000 cap, and that the agency would receive no general revenue.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

AECT commented that in §21.3(b)(7) the commission is proposing to raise the multiplier from 1.0 up to 1.75. AECT commented that a potential 75% increase in total fee could significantly increase the fee. AECT stated that the proposed rule provides that the multiplier would be applied each FY and might change annually. AECT commented that this would introduce a level of uncertainty that businesses would find onerous for the planning of their budgets and operations. This multiplier variability calls for some phase-in or limits on annual increases in the multiplier, irrespective of the proposed fee rate increases.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a $30 million shortfall, no change from the $75,000 cap, and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The commission values the need for prior planning. Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach for the new fee rates including the multiplier. The commission made no change in response to this comment.

TCC commented that the proposed rule language allows for a 1.75 multiplier; however, the rule language itself does not reference what constitutes a baseline for the 1.75 multiplier. TCC also commented that the proposed rule language specifies up to a maximum rate for the various specific billing attributes, as well as referencing the statute for a maximum fee. TCC stated that the 1.75 multiplier text in the proposed rule is confusing and contradictory and recommended that it should be eliminated.

Under the previous rule the multiplier was set at 1.0 which was the baseline. Under this rule, the baseline is still 1.0 but the rule allows the commission to apply a multiplier up to 1.75. The multiplier will apply to the total amount after the new fee assessments

have been calculated under the new rates. The agency anticipates adjusting the multiplier only as necessary to meet an increase in obligations against Account 153. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

AECT stated that most electric generation companies have made substantial investments to secure water rights in advance of the time when they will actually need the water in order to ensure that adequate water will be available for future electric generating units and for existing electric generating units during droughts. AECT commented that increasing the §21.3(c) water fees will have a negative, possibly significant, impact on the electric generation industry.

The commission acknowledges that electric generation utilities have a substantial investment in securing water rights, however, the fee rate in this rule will treat all water right holders, large or small, the same depending on type of use. While the tiered fee structure for higher volume water usage was eliminated, the fee for water rights for hydropower purposes was reduced under this rulemaking. The agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one sector. The commission made no change in response to this comment.

§290.51. Fees for Services to Drinking Water System.

Bethesda WSC is against the proposed TCEQ increase for PHS fees. Currently water utilities are burdened with additional water chemical sampling costs and other mandated programs. Given the extremity of this statute the TCEQ should allow "regulatory fees" assessments as a line item on customer billing.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. However, without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. Federal and state laws to which the commission is subject require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Whether the commission is exercising its original jurisdiction over an IOU or its appellate jurisdiction over a water supply corporation the commission has rules that govern what can be charged in the utility's rate and what can be listed on the utility bill. Section 291.76(b) requires a utility service provider which provides potable water or sewer utility service to collect a regulatory assessment from each retail customer and remit the fee to the commission. Section 291.76(g) allows a utility service provider to include the assessment as separate line item on a customer's bill or include it in the retail charge. Section 291.31 allows a utility to charge reasonable and necessary expenses to rendering service to rate payers. The commenter mentions sampling costs as an expense for the utility. Section 291.21(k)(2)(A) allows the utility to collect a surcharge for sampling fees not already included in the utility's rate. The commission made no change in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, including water programs; §5.102, concerning general powers of the commission; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.701, which provides statutory direction regarding the use of fees collected for deposit to the water resource management account; §26.011, which requires the commission to control water quality in the state; §26.0135, which directs the commission to apportion, assess, and recover reasonable costs of administering the water quality management program under that section; §26.0291, which establishes a water quality fee and water use fee for wastewater permit holders and water rights holders; and, §26.0292, which addresses the manner in which the commission assesses fees for aquaculture facilities.

The adopted amendment implements TWC, §§26.011, 26.0135, 26.0291, and 26.0292.

§21.3. Fee Assessment.

(a) The fee calculation is based on the authorized limits contained in wastewater permits and water rights as of September 1 each year, without regard to the actual amount or quality of effluent discharged or the actual amount of water used.

(b) Assessment for wastewater permits.

(1) An annual fee is assessed against each person holding a wastewater permit. A separate fee is assessed for each wastewater permit.

(2) The maximum fee which may be assessed any permit, including an aquaculture permit, is the amount, if any, set forth in Texas Water Code (TWC), Chapter 26. The minimum fee for an active permit is $1,250. The minimum fee for an inactive permit is $620.

(3) In assessing a fee under this chapter, the commission considers the following factors:

(A) flow volume, and type;

(B) traditional pollutants;

(C) toxicity rating;

(D) storm water discharge;

(E) major designation;

(F) active or inactive status;

(G) discharge or retention;

(H) the designated uses and ranking classification of waters affected by waste discharges; and

(I) the costs of administering the following commission programs:

(i) water quality administration, including inspection of waste treatment facilities and enforcement of the provisions of TWC, Chapter 26, the rules and orders of the commission, and the provisions of commission permits governing waste discharges and waste treatment facilities;

(ii) the Texas Clean Rivers Program, under TWC, §26.0135, which monitors and assesses water quality conditions that support water quality management decisions necessary to maintain and

improve the quality of the state's water resources (as defined in TWC, §26.001(5)).

(4) For the purpose of fee calculation, chemical oxygen demand (COD) and total organic carbon (TOC) are converted to biochemical oxygen demand (BOD) values and the highest value is used for fee calculation. The conversion rate for TOC is three pounds of TOC is equal to one pound of BOD (3:1). The conversion rate for COD is eight pounds of COD is equal to one pound of BOD (8:1).

(5) Fee rate schedule. Except as provided in paragraph (6) of this subsection, the fee shall be determined as the sum of the following factors:

(A) contaminated flow, an amount up to a maximum of $1,090 per million gallons per day (mgd);

(B) uncontaminated flow, an amount up to a maximum of $18 per mgd;

(C) traditional pollutants, an amount up to a maximum of $23 per pound per day;

(D) toxic rating for industrial discharges:

(i) Group I, an amount up to a maximum of $310;

(ii) Group II, an amount up to a maximum of $1,090;

(iii) Group III, an amount up to a maximum of $1,640;

(iv) Group IV, an amount up to a maximum of $2,460;

(v) Group V, an amount up to a maximum of $4,910; and

(vi) Group VI, an amount up to a maximum of $9,830;

(E) major permit designation, an amount up to a maximum of $3,120; and

(F) storm water authorization, an amount up to a maximum of $780.

(6) For the types of permits listed in this paragraph, these additional guidelines will apply in determining the fee assessment.

(A) Land application (retention) permits. The fee assessed a land application permit shall be 50% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an active land application permit be less than $1,250 per year.

(B) Inactive permits. The fee assessed an inactive permit shall be 50% of that calculated under paragraph (5) of this subsection. In the event an inactive permit is for a land application operation, the fee assessed shall be 25% of that calculated under paragraph (5) of this subsection. However, in no event shall the fee for an inactive permit be less than $620 per year.

(C) Storm water only permits. The fee for an active permit which authorizes discharge of storm water only, with no other wastewater, is an amount up to a maximum of $780.

(D) Aquaculture permits.

(i) In determining the flow volume to be used in fee calculation for an aquaculture production facility under paragraph (5) of this subsection, the flow for the facility shall be the facility's permitted annual average flow, or the facility's projected annual average flow if the permit does not have an annual average flow limitation.

(ii) If the facility's permit does not have an annual average flow limitation, the facility's projected annual average flow for the upcoming period from September 1 to August 31 shall be submitted to the executive director by June 30 preceding the fee year and shall be signed and certified as required by §305.44 of this title (relating to Signatories to Applications), and that amount will be used for fee calculation.

(iii) The maximum annual fee for aquaculture production facilities is the amount, if any, set forth in TWC, Chapter 26.

(7) A multiplier may be applied to adjust the total fee per permit, which would also adjust the total assessment for all permits under the Water Quality Fee Program. The multiplier will be an amount up to a maximum of 1.75. As part of the approval of the annual operating budget, the executive director shall report to the commission the multiplier that will be applied for the upcoming fiscal year.

(c) Assessment for water rights.

(1) An annual fee is assessed against each person holding a water right, except for those exemptions specified in this section. A separate fee is assessed for each water right. These fees do not apply to water uses, including domestic and livestock use, which are exempt from the need for authorization from the commission under TWC, Chapter 11.

(2) This fee will apply to all municipal or industrial water rights, or portions thereof, not directly associated with a facility or operation which is assessed a fee under subsection (b) of this section, and to all other types of water rights except agriculture water rights and certain hydroelectric water rights described in paragraph (5) of this subsection.

(3) The fee for each water right authorizing diversion of more than 250 acre-feet per year for consumptive use shall be $.385 per acre-foot.

(4) An authorization to impound water will be assessed a fee only when there is no associated consumptive use authorized, and then the fee will be calculated at the non-consumptive rate described in paragraph (5) of this subsection.

(5) The fee for water rights for non-consumptive use above 2,500 acre feet per year, including hydropower purposes, shall be $.021 per acre-foot. The fee shall not be assessed against a holder of a non-priority hydroelectric right who owns or operates privately-owned facilities which collectively have a capacity of less than two megawatts.

(6) Water which is authorized in a water right for consumptive use, but which is designated by a provision in the water right as unavailable for use, may be exempted from the assessment of a fee under paragraph (3) of this subsection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER E. FEES FOR PUBLIC WATER SYSTEMS

30 TAC §290.51

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts the amendment to §290.51 *without change* to the proposed text as published in the March 13, 2009, issue of the *Texas Register* (34 TexReg 1786) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Water Resource Management Account 153 (Account 153) is the primary source of state funding for essentially all water program related activities of the commission. In 2001, the 77th Legislature passed House Bill (HB) 2912 which provided that revenues deposited to Account 153 would be available to support activities associated with ensuring the protection of the state's water resources. Account 153 supports a wide range of activities including water rights, storm water, public drinking water, Total Maximum Daily Load (TMDL) development, water utilities, wastewater, river compacts, water availability modeling, water assessment, Concentrated Animal Feeding Operations (CAFOs), sludge, Clean Rivers Program, and groundwater protection. Historically, the agency has used Account 153 as well as the majority of its general revenue appropriations to support its water program activities.

General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. In addition, many of the water-related fees that the agency does assess have not increased in seven to ten years. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. As a result, the fund balance is close to being depleted. The revenue estimates for Account 153 revealed that without an increase in fees there would be insufficient funds for the agency to cover the costs of its water program activities in fiscal year (FY) 2010 - 2011.

Given the declining availability of funds in Account 153, the commission reviewed those water-related fees it has the authority to change. After a review of the commission's existing water-related fees, the commission is adopting revisions to the consolidated water quality (CWQ) fee, the public health service (PHS) fee, and the water use assessment fee (WUF) to generate sufficient revenue to cover the costs of its water program activities beginning in FY 2010. These fees were identified for a fee increase because, in terms of numbers and categories of fee payers, they represent some of the most broad-based water-related fees the agency assesses, revision of these three fees does not require statutory changes, and their revenue stream is relatively stable and represents significant water fee collections.

This adopted rulemaking amends Chapter 290, Public Drinking Water, to ensure that there are sufficient funds in FY 2010 to carry out the tasks required to protect the water resources of the state. In a corresponding rulemaking published in this issue of the *Texas Register*, the commission adopts the amendment to 30 TAC Chapter 21, Water Quality Fees. It is anticipated that to the extent affected fee payers need to increase rates to their customers through a tariff change, such change could be requested pursuant to 30 TAC §291.21(b)(2)(A)(iv), which authorizes the executive director to approve minor tariff changes in certain instances based on governmental requirements beyond the utility's control.

SECTION DISCUSSION

The commission adopts the amendment to §290.51(a)(3) that would increase the fee amount in subparagraph (A) from $75 to $100 and in subparagraph (B) from $150 to $175. These increases were determined to be minimal for small systems with 160 connections or less. The commission also adopts the deletion of the formula, in subparagraph (C) which provides: "=$c^{0.70}$ X $7.40, where "c" is the number of connections," and in place of the formula provide that the fee will be an amount up to a maximum of $2.15 per connection. This change requires the same fee per connection for all systems with 161 connections and greater and will generate the necessary revenue to cover the cost of the TCEQ's water program activities. The commission also adopts the change to the parameters regarding number of connections in subparagraph (B) from 25 - 99 to 25 - 160 and in subparagraph (C) from 100 connections to 161 connections. The commission adopts the amendment to §290.51(a)(5) that increases the fee from $75 to $100. The assessment determined under §290.51(a)(3)(C) will be applied uniformly to all fee payers in this category and will be determined by the annual appropriations and other associated costs from Account 153. The commission adopts these changes to allow the commission the ability to assess fees as needed to cover, in part, the costs of its water program activities.

The commission adopts the amendment to §290.51(a)(6) that updates the payment methods to include electronic funds transfer and the agency's payment portal. These options have been available since September 2004 and reflect current agency practice. Additionally, the commission adopts the change concerning the name of the agency from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted rule is part of a larger adopted rulemaking to increase fees in order to provide funding for the commission's water program activities. In a corresponding rulemaking, the adopted amendment to Chapter 21, Water Quality Fees, is published in this issue of the *Texas Register*. The adopted amendment to Chapter 290 does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with the statutory requirements set forth in the Texas Water Code (TWC) and Texas Health and Safety Code. Therefore, the commission finds that this rulemaking is not a "major environmental rule."

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225 only applies to a state agency's adoption of a major environmental rule, the result of which it to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or, 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rulemaking does not meet any of these requirements. First, there are no applicable federal standards that this rulemaking would address. Second, the adopted rulemaking does not exceed an express requirement of state law, but rather seeks to provide the commission with the additional revenue necessary to operate its water programs in a manner that is consistent with state law. Third, the adopted rulemaking does not exceed a requirement of a delegation agreement or a contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections which are cited in the STATUTORY AUTHORITY section of this preamble.

Based upon the foregoing, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The commission determined that the adopted rulemaking does not constitute a taking. The specific purpose of the adopted rulemaking is to provide the commission with the additional revenue necessary to operate its water program activities in a manner that is consistent with the statutory requirements set forth in the TWC and Texas Health and Safety Code.

This rulemaking substantially advances this stated purpose by adjusting the factors by which the fees are calculated to provide funding at a level that is sufficient to support a portion of the commission's water program activities.

Promulgation and enforcement of this adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulation does not affect a landowner's rights in private real property because the rulemaking does not burden, restrict, or limit the owner's right to real property, and does not reduce the market value of real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. The adopted rulemaking will not burden private real property because it amends fee rules which relate to funding for the commission's water program activities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on April 7, 2009 in Austin, Texas. At the hearing the commission received comments from the City of Austin (Austin); the City of Houston (Houston); El Paso Water Utilities (El Paso); Luminant Power (Luminant); and the San Antonio Water System (SAWS). The comment period closed on April 13, 2009.

The commission received written comments from: Agua Special Utility District (Agua SUD); American Electric Power (AEP); the Association of Electric Companies of Texas, Inc. (AECT); Bethesda Water Supply Corporation (Bethesda WSC); the Honorable Ronald F. Branson, Mayor of Carrollton (Mayor Branson); Calpine Corporation (Calpine); City of Arlington Water Utilities Department (Arlington Water Utilities); City of Brownwood (Brownwood); City of Carrollton, Public Works Department (Carrollton, Public Works Department); City of Cleburne (Cleburne); City of Denton (Denton); City of Grandview (Grandview); City of Hughes Springs, including the Honorable Reba Simpson, Mayor of City of Hughes Springs; the Honorable James Samples, Mayor Pro Tem, City of Hughes Springs, the Honorable William V. Jones, City Council Member, City of Hughes Springs, and the Honorable Lee Newsom, City Official, City of Hughes Springs (together referred to as Hughes Springs); City of Jefferson (Jefferson); City of Lone Star (Lone Star); City of Odessa (Odessa); City of Ore City (Ore City); City of Pittsburg (Pittsburg); City of Plainview, Public Works Department (Plainview Public Works); City of Pleasanton (Pleasanton); City of Rosenberg (Rosenberg); City of Sugar Land (Sugar Land); City of Taylor Landing (Taylor Landing); City of Wylie (Wylie); El Paso Water Utilities (El Paso); Guadalupe-Blanco River Authority (GBRA); Hardin County Water Control and Improvement District No. 1 (Hardin County WCID); Kamira Water System (Kamira); Kempner Water Supply Corp. (Kempner WSC); L&L Engineers and Planners, Inc. (L&L); Lake Corpus Christi RV Park and Marina (Lake Corpus Christi RV); Lone Star Chapter of the Sierra Club (Sierra Club); Lower Colorado River Authority (LCRA); Luminant Generation Company LLC (Luminant); New Ulm Water Supply Corp. (New Ulm WSC); Northeast Texas Municipal Water District (Northeast Texas MWD); NRG Texas Power LLC (NRG); SEC Energy Products (SEC); Shin-Etsu Silicones of America (Shin-Etsu); the Honorable Reba Simpson, Mayor of Hughes Springs (Mayor Simpson); Talty Water Supply Corporation (Talty WSC); Texas Association of Business (TAB); Texas Chemical Council (TCC); Texas Municipal League (TML); The Shilk Co., Inc. (Shilk); Upper Guadalupe River Authority (UGRA); Valley Mobile Home Properties (Valley Mobile Home); Water Environment Association of Texas (WEAT); and five individuals. The commission also received a joint comment

letter from Arlington Water Utilities; Beaumont Water Utilities; El Paso Water Utilities; Houston Public Works & Engineering; Austin Water Utility; City of Dallas Water Utilities; the Fort Worth Water Department; and the San Antonio Water System. In the RESPONSE TO COMMENT section of this preamble these utilities will be referred to as "the Utilities." WEAT concurs with the comments submitted by the Utilities.

Sierra Club and two individuals supported the rule. Calpine and WEAT supported funding for the commission but suggested changes to the proposed rule as described in the RESPONSE TO COMMENTS section of the preamble. AEP; AECT; Agua SUD; Arlington Water Utilities; Austin; Bethesda WSC; Mayor Branson; Brownwood; Carrollton, Public Works Department; Cleburne; Denton; Grandview; GBRA; Hughes Springs; Houston; Jefferson; Lone Star; Odessa; Ore City; Pittsburg; Pleasanton; Plainview Public Works; Rosenberg; Taylor Landing; Wylie; El Paso; Hardin County WCID; Kamira; Kempner WSC; L&L Lake Corpus Christi RV; LCRA; Luminant; New Ulm WSC; Northeast Texas MWD; NRG; SAWS; SEC; Shin-Etsu; Shilk; Sugar Land; TAB; Talty WSC; TCC; TML; UGRA; the Utilities; Valley Mobile Home; and three individuals opposed the rulemaking.

RESPONSE TO COMMENTS

General

One individual commented that they support the rule.

The commission acknowledges the comment in support of the rule.

One individual commented that if this is an attempt to be more efficient and timely in processing applications and more accountable for time and tax payer money spent, then the commenter is supportive because he believes these departments are severely lacking in these areas.

While this increase is intended to allow the commission to continue performing the same level of water program activities in FY 2010 as it is currently performing, the commission has reviewed and will continue to review its processes for improvements in efficiency, including application processing times.

As a state agency, the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to United States Environmental Protection Agency (EPA) regarding its performance. The commission made no change in response to this comment.

The Sierra Club supports the proposed rules to raise three separate water fees to better support the agency's needs. The Sierra Club also commented that it fully supports changing the PHS fee to a flat per-connection fee and raising the multiplier for the CWQ.

The commission acknowledges the comment in support of the rule.

Calpine expressed support for the efforts by the TCEQ to increase revenue to replace a decrease in general revenue but commented that the selected approach does not provide sufficient lead time for implementation and would disproportionately affect smaller users and dischargers.

Over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no changes in response to this comment.

WEAT commented that it concurs with comments previously submitted to TCEQ by municipal utility directors.

The letter submitted by the municipal utility directors was a joint letter and the commenters from that letter are referred to as "the Utilities" in the RESPONSE TO COMMENT section of this preamble. The commission acknowledges WEAT's support of the Utilities' comments. The commission made no changes in response to this comment.

Rosenberg commented that the commission should allow the governmental unit the ability to invest this money into infrastructure repair/replacement projects thereby reducing impacts on the environment.

The commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules and acknowledges that a utility investing in its infrastructure is desirable.

However, over the past two budget cycles the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. During the same time period, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency had to

raise fees to maintain the same level of water program activities as it is currently providing. The commission made no change in response to this comment.

One individual asked what the fees will pay for.

The fees will provide the majority of funding for the commission's water program which includes activities associated with water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, Clean Rivers Program, and groundwater protection. The commission made no change in response to this comment.

Valley Mobile Home commented that the postcard the commission mailed to potentially affected fee payers had the incorrect Web site listed for the water fees Web page.

On March 9, 2009, the commission mailed a postcard to potentially affected fee payers with a link to a Web page (*www.tceq.state.tx.us/go/waterfees*) that contained information about the proposed fee rule. The commission regrets that the commenter had difficulty accessing this Web page; however, commission staff has checked the Web address on the postcard and found that it is a good and active link. An alternate link by which the Web page can be accessed is (*http://www.tceq.state.tx.us/agency/waterfees.html*). The commission made no change in response to this comment.

One individual asked why the commission asks for comments.

Texas Government Code, §2001.029(a) provides an opportunity for the regulated community and public to comment on state agency rules. The commission values the opportunity to receive feedback from the public and regulated community regarding its rule proposals and it considers all comments that it receives. The commission made no change in response to this comment.

Hardin County WCID stated that agencies create rules and demands for information that will justify their existence and commented that the fees charged by the agencies are used to pay salaries to people sending out demands for information.

The agency carries out the responsibilities charged to it by the legislature and for certain programs, the EPA. Inherent in some of those responsibilities is the requirement to gather information from regulated entities. The agency has recently conducted a review of agency reports in an effort to reduce or eliminate unnecessary or duplicative reports and has also attempted to streamline the reporting requirements for regulated entities through the development of its electronic reporting systems. The commission made no change in response to this comment.

Agua SUD asked if the State of Texas could implement a statewide environmental tax to individuals and corporate Texas.

The commenter's suggestion of a statewide environmental tax is not within the authority granted to the commission by the legislature. Whether it could be implemented by any other state governmental body is outside the scope of this rulemaking. The commission made no change in response to this comment.

Agua SUD requested that the commission advise all Texans that there will be an increase in their bills to facilitate providing operating funds for the TCEQ and set up manned hotlines to explain to Texans the reasons for the increases. Agua SUD stated that this would let utility customers know that it would be pointless to argue the fee increases with their local providers.

To assist potentially affected fee payers in planning for their FY 2010 budgets the commission established a Web page that provided information about the proposed fee changes. The link to the Web page is: *http://www.tceq.state.tx.us/agency/waterfees.html*.

This Web page can be used as a resource for utilities that receive phone calls from their customers with questions about the fee increases. The commission made no change in response to this comment.

Shin-Etsu commented that the shock of such a fee increase would have immediate negative impacts on the company and would compromise the company's ability to pay future fees to the TCEQ.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue the same level of water program activities. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company. The commission made no change in response to this comment.

Mayor Branson and Carrollton, Public Works Department commented that automatically assuming a utility's ability to pass on the fee and declare no fiscal impact does not reflect reality. Carrollton, Public Works Department stated that both their city's utility providers typically increase their rates annually; that they are faced with replacing aging infrastructure at a reasonable level; and, that approximately 10% of its customers pay the minimum rates because of limited incomes and can be financially challenged by these numerous demands on utility rates. Mayor Branson commented that water rates and the affluence of the customer base vary widely throughout the state and even within counties and that not all utilities will be able to easily pass on the increase. Mayor Branson also noted that proposed Senate Bill (SB) 2316 and HB 1433 allow an increased cap from $75,000 to $200,000 so there is a likelihood of further fee increases in the near future which will put additional budget pressures on utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The numbers presented in the commission's rule proposal were based upon a worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap, and that the agency would receive no general revenue. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost on to utility customers. The agency acknowledges the financial impact of imposing fee increases and the financial burden it can place on

customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Luminant commented that because the multiplier is part of the regulation, it cannot be readily used to make adjustments in fees collected, and any change in the value must go through the rulemaking process. Luminant stated that as a participant in the stakeholders group for the last major wastewater fee adjustments, Luminant was led to understand that the multiplier was in place to allow for adjustment of revenue without changes to the fee structure. Luminant commented that this now is clearly not the case; and the multiplier concept should be either left at 1.0 or deleted as it is neither necessary nor useful. Luminant stated that a fee structure should be well reasoned and clearly stated, without the need of a multiplier because this would allow the regulated community to evaluate the true impact of any increase.

The multiplier allows the commission to adjust fees across the board without adjusting fee rates on the individual parameters. The multiplier is necessary for the agency to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative actions regarding agency appropriations. The agency has placed a provision in the rules requiring that as part of the operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

As an example of its fiscal responsibilities, Grandview referred to the creation of the proposed Prairie land Groundwater Management district as a potential solution toward addressing the depletion of our aquifers. Grandview stated that the $.30 per thousand gallons for the water it must pump from the Trinity Aquifers to address the needs of our citizens must be passed on to them as a surcharge and that a coupled with other fees proposed for TCEQ Grandview is facing a significant fiscal impact on this small city.

Grandview's suggestion regarding the creation of the Prairie land Groundwater Management District is not within the scope of this rulemaking. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, there are federal and state laws which require the commission to carry out specific tasks to protect the state's water resources. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to these comments.

Lake Corpus Christi RV commented that it sees no need for any additional fees when we all own our own wells and water rights. Lake Corpus Christi RV commented that it believes the state is exceeding its authority in mandating such fees other than the monthly well sampling.

Federal and state laws require the commission to carry out specific tasks to protect the state's water resources. The commission is responsible for ensuring clean, reliable supplies of water to support the needs of the state. In order for the commission to ensure a clean and reliable supply of water, the commission must check, evaluate, and address water quality and quantity which requires the commission to incur expenses related to personnel, equipment, laboratory, travel and data management. The commission's authority to establish fees in this rulemaking can be found in TWC, §§5.701, 26.0135, and 26.0291 and also in Texas Health and Safety Code, §341.041. The commission made no change in response to this comment.

Cleburne commented that there has to be some accountability for the services rendered to justify such a large increase in cost.

Over the last several years, the agency has reviewed its water program activities and made efforts to streamline processes and to use technology that provides efficiencies. However, water program activities have not received sufficient funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue it would be required to cut program activities.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The commission made no change in response to this comment.

One individual commented that state resources have been wasted on politically motivated regulatory and propaganda activities and that this shows there is more money presently available.

The commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws. In implementing the programs and activities required under these laws, the commission has attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. These reviews consistently reveal that additional resources are needed and that extra funding is not available. The commission made no change in response to this comment.

One individual commented that a way to reduce spending is to eliminate TCEQ regulatory activity that exceeds EPA guidelines.

The commission must comply with both state and federal environmental laws. This rulemaking affects the CWQ fee, PHS fee, and WUF. These fees come from the following areas within the agency, respectively: the Water Quality Division, the Water Supply Division, and the Water Quality Planning Division. These divisions implement both state and federal laws. The commission made no change in response to this comment.

Wylie asked if the TCEQ is operating as efficiently as it can to perform its delivery of services and whether water purveyors would see an increase in services or assistance provided by this fee increase.

The commission has attempted to streamline processes, to use technology that provides efficiencies, and to periodically review its programs and their funding to ensure that funds are used as efficiently as possible. The fee increases are necessary to allow the commission to continue providing the current level of water program activities and will not result in additional services. The commission made no change in response to this comment.

The Sierra Club commented that until the legislature adjusts the $5,000 cap for aquaculture facilities and the $75,000 cap for all other facilities, it will place a significant burden on some small operators and businesses; however, by making the proposed

rule flexible and referring to the statutory cap, it will allow TCEQ to adjust fees if the cap is raised.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

GBRA commented that the alternative fee increase rule proposal effectively places most if not all of the commission's costs solely on the backs of those citizens who receive services from municipal water and wastewater systems.

While the proposed fee rate increases will affect citizens who receive services from municipal water and wastewater systems, the agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one group of fee payers. The increase is not projected to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not anticipated to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works requested more information as to why the overall financial obligations of Account 153 have increased. Plainview Public Works asked whether the financial obligations are increasing because of impacts in the large growth centers in Texas and whether these growth centers should be funding the new financial needs in Account 153.

Over the past two budget cycles, water program costs have remained relatively constant but the source of the funding has shifted more heavily toward water fee revenue from general revenue. During the same time period the amount of funding the commission has received from general revenue has decreased and appropriations from Account 153 have increased. The commission has been using the Account 153 fund balance to cover the water fee revenue shortfall. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The need for additional revenue is not related to impacts of large growth centers in Texas. The commission made no change in response to this comment.

Plainview Public Works commented that there is a paragraph on the commission's water fees Web site that has a partial list of programs that the Account 153 supports and asked if any of these programs can be identified as having an inordinate impact on TCEQ accounts.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB recognizes that the uses to which certain water program fees may be applied was broadened by statute in 2001 but commented that there remain practical limits to the ability of an agency to establish the level of an administrative fee. TAB commented that there must be some reasonable relationship between the fee and the costs incurred or benefit received by the entity paying the fee. TAB stated that a fee that bears no reasonable relationship to cost or benefit ceases to be a fee and becomes a tax.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This rulemaking does not create a tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no change in response to comments.

SAWS commented that the fee increases are extreme. SAWS gave the example that its fee increase for the PHS fee and the CWQ fee is $1.1 million, or $1.4 million dollars with an increase in the cap, and would equate to SAWS funding the full-time loaded salaries of 23.6 full time equivalents or over 49,000 man hours a year. Houston commented that the proposed fee increases for the PHS fee and the CWQ fee will be about $3 million dollars or almost 1% of its operating and maintenance budget. Houston commented that this fee increase does not make any logical sense.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html*. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The

legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

While the fee increases are significant, over the past several years the commission has made it widely known what the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to these comments.

Wylie commented that its PHS fee would go up to $24,598.15 per year from the current $4,892.65 per year rate which is an increase of nearly 500%. Wylie asked why there is such a drastic increase all at once.

Over the past several years the commission has made it widely known what the impact of a depleted Account 153 fund balance and reduced general revenue appropriations would be. The agency made great efforts to provide notice of possible fee increases as early as possible to allow fee payers sufficient time to include such information in their budgeting processes. Account 153 has always depended on general revenue and when general revenue appropriations were reduced two bienniums ago the agency had to use the fund balance to maintain program operations. Because the Account 153 fund balance is nearly depleted the agency needs to raise the full amount of funding. The increase is not anticipated to significantly impact utilities because utilities generally have the ability to pass the cost to their customers. In addition, the increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Plainview Public Works commented that it would like more information as to the actual fee increase specific to Plainview. Plainview Public Works stated that, using the information provided by the commission, the proposed fee increase for Plainview would be 136% on the CWQ fee and 374% on the PHS fee. Plainview Public Works requests confirmation of these numbers.

Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html*. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap, and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

WEAT commented that with the current statutory cap on the CWQ fee, any change in the fee structure to increase fees will place the burden on small to medium-sized dischargers not currently at the cap. WEAT commented that this increase will, in turn, be passed on to rate-payers.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and will lessen the burden to some extent for those fees that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

LCRA commented that if the proposed rule is adopted its current fee amounts would nearly double and that if pending legislation is passed raising the fee cap to $200,000, then the LCRA's total fee amounts would nearly triple.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The fee revenue needs to be sufficient to meet Account 153 appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Odessa commented that under the proposed rule the fee for services to its drinking water systems would increase from approximately $13,000 to $82,000 and that the annual fee associated with the wastewater permit would increase from $53,410 to $75,000 (or $82,107 if HB 1433 passes removing the $75,000 cap) Cleburne commented that the magnitude of impact associated with the rule is extreme. Cleburne commented that under the proposed rule its PHS fees would increase five to ten fold and the CWQ fees would increase 20 to 25 fold and that this type of

increase is significant for a municipality of its size. Denton commented that under the proposed rule its PHS fee will increase by a factor of seven from $12,280.79 to $85,579.00. GBRA commented that it does not support the proposed increase in regulatory fees due to the magnitude of the proposed increases and the effect on GBRA's water and wastewater customers who ultimately must pay the increased costs. GBRA listed its fees and showed that its CWQ fee would increase by 92%; its PHS fee would increase by 121%; and its WUF fee would increase by 284%. Arlington Water Utilities commented that for the PHS fee and the WUF fee they will face a single year increase of $202,515 or 745%. Sugar Land commented that based on the maximum potential fees it would be facing increases roughly totaling $102,000 and $45,000 for its CWQ fee and PHS fee, respectively. Sugar Land stated that compared to previous years, this represents over a 300% increase in fees as well as a substantially larger payment in absolute terms. El Paso commented that the commission cannot ignore the total impact of their proposal to raise both the CWQ fee and the PHS fee. For example, El Paso stated, their proposed PHS fee would increase from $37,050 to a staggering $397,176 or result in nearly a 1,000% increase. Further, El Paso stated, their proposed combined increase in water and wastewater fees would go from $265,838 to $1,008,972 or an increase of $743,134 per year.

The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities.

The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html*. The commission made no change in response to this comment.

Northeast Texas MWD noted pending legislation to raise the cap from $75,000 to $200,000 and stated that an entity staying at the cap maximum would experience an increase factor of 2.67. Northeast Texas MWD commented that smaller systems would bear the burden of the fee increase and cited itself as an example stating that under the same scenario it would experience an increase factor of 3.58.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers and the burden is lessened to some extent for those fee payers that were not at the $75,000 cap. This would generally include small and medium-sized entities. The commission made no change in response to this comment.

AEP stated that their fees will be increased by 56% to 235% for six out of the seven AEP-owned power plants in Texas with water quality permits and that these amounts will increase substantially if a multiplier is applied in the future. AEP commented that TCEQ may be under the impression that the cost increase can be passed along to our customers; however, rate increases for the utility industry are long and complex processes that can take years.

The commission acknowledges that these fee increases are significant and that certain entities may need prior regulatory approval before passing costs on to their customers; however, without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. Because of the potential for some variability between the data the fee payers use to calculate their fee rates and the information the commission has regarding each fee payer, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find information about how to contact the commission at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html*. The agency built into this rule the ability to modify rates to ensure that funding is sufficient to carry out its water program activities and to provide flexibility to respond to legislative action regarding agency appropriations. The commission made no change in response to this comment.

AEP expressed concern that the fee for uncontaminated flow increased by 80%, the largest percentage increase of all the fees. AEP stated that many of our facilities use a once-through cooling water system that discharges high volumes of uncontaminated

flow. AEP commented that this fee increase appears to disproportionately affect the electric utility industry considering many power plants in the state use this technology. AEP commented that uncontaminated flow does not have a significant impact on the environment and should not be subjected to the largest percentage increase. NRG commented that while the fee increases in Chapter 21 ranged from 53% for traditional pollutants to 56% for contaminated flows, storm water, toxicity, and major facility designation there did not appear to be a basis for the increase of uncontaminated flows to 80%. NRG suggested that this fee increase be consistent with the other fee increases. AECT commented that there is inadequate justification for the fee rate for uncontaminated flow to be increased by 80%, when the fee rates for the other discharges listed in §21.3(b)(5) would only increase by a little over 50%, especially since most of the other types of discharges involve discharges of contaminated wastewater. AECT commented that proposed 80% increase in the fee rate for uncontaminated flow would disproportionately affect power plants that use once through cooling water systems because such systems generate significant volumes of uncontaminated flow. Luminant commented that the proposed increase of 80% for uncontaminated flow found in §21.3(b)(5)(B) is the greatest concern and appears to be both excessive and disproportionate. Luminant stated that uncontaminated flow is just that; uncontaminated and that for the electric generating industry this flow typically consists of noncontact cooling water, which is the most water conserving method available. Luminant also stated that in many cases the water is taken from, and returned for reuse, to an industrial cooling impoundment specifically built for that purpose and that by definition it has the least impact to water quality. Luminant concluded that for these reasons, it is inappropriate to impose such a dramatic increase on the one category classified as uncontaminated. Luminant also noted that this particular category is virtually industry specific, and will have a disproportionate significant impact on the electric utility industry.

The commission acknowledges that there is a difference between uncontaminated and contaminated flows, and this difference is reflected in the rates for each of these factors. In an effort to have all categories of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%. Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rates for that factor increased at a greater percentage than the average. This rulemaking affects all entities with uncontaminated discharges, not just electric generation facilities. The general revenue appropriation in addition to the changes in the cap for the CWQ fee will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no changes in response to these comments.

Talty WSC commented that its rate will be going up from $0.70 to $2.15 and that is more than three times the old rate and that it does not believe that there has been adequate time for water systems to prepare for this increase (along with the many other increases we receive).

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. The agency has made great efforts to provide notice of possible fee increases as soon as possible to allow fee payers sufficient time to include such information in their budgeting processes. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The increase is not anticipated to significantly impact utilities because utilities have the ability to pass the cost to their customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

Kempner WSC understands that six years without an increase in fees is too long. However, Kempner WSC commented that it appears that the six-year time period is being used to not only catch up on lax oversight but to inflate the increases as well. Kempner WSC stated that almost all of the fees are being doubled and in many cases a hundred fold and in some much more than that.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The amounts identified by the commenters are based on the worst case scenario set forth in the fiscal note in the proposed rule that projected a $30 million shortfall, no change to the $75,000 cap and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

El Paso commented that the impact of these fees is substantial. For example, El Paso stated, the amount of monies needed to meet the fees could fund 20 water and wastewater operators or could finance a much needed $10 million in capital projects.

A utility investing in its staff and infrastructure is desirable and the commission appreciates the struggle regulated entities face as they work to maintain compliance with state and federal rules. The commission acknowledges that these fee increases are significant but without additional revenue the commission will not be able to perform the same level of water program activities as it is currently providing. The commission is required to follow and to enforce state and federal environmental laws and must raise its fees to be able to conduct water program activities as required

by these laws. The commission made no change in response to this comment.

Rosenberg commented that it strongly disagrees with the proposed fees and recommend the fees be left at their current amounts for at least an additional two-year period. Rosenberg suggested that after the two-year delay, fee increases should be gradually implemented over a period of years. TCC stated that the preamble to the rule notes that fees have not increased since 2002. TCC commented that inflation would have increased the fees at the facilities that pay the CWQ fee by an average of approximately $5,900 per facility (source Department of Labor CPI calculator). TCC stated that such dramatic fee increases in a single budget year represent an unwelcome surprise which is exacerbated by increasing the fee during the current budget year. TCC recommended that any fee increase should be phased in so that such dramatic increases are not incurred in a single year and timed such that entities on a calendar FY have adequate notice for budgeting purposes. TCC suggested that a phase in between the years of 2010 and 2015 would provide for more adequate notice. Calpine stated that the budgeting process for municipalities and industrial regulated entities generally begins during the prior calendar and/or FY. For example, Calpine stated, the CWQ fees for the TCEQ FY 2010, which will be invoiced in October 2009, were budgeted by Calpine in August/September 2008. Calpine commented that any fee increase that is implemented for TCEQ FY 2010 will result in a budget variance at each affected facility. Calpine suggested that the commission could defer the rate increase until at least TCEQ FY 2011 allowing regulated entities adequate time to budget for the change or stagger the implementation over a period of years to minimize the effect of a large percentage increase in fees. Houston commented that the timing of the proposed rule is not good and that not giving all utilities at least one year to plan for the increases would be a burden. Cleburne commented that the proposed increase is not staggered in any manner and fails to recognize budgetary limitations and rate increase requirements that may have to be imposed just to collect these fees. Agua SUD asked if the commission could review its operating costs and improvements annually and increase their costs accordingly over five to ten years. Agua SUD also commented that the commission should reevaluate immediate needs and future projected needs and then increase costs annually over time so that rate payers can adjust their budgets to the increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommend a phased-in approach with ample time for input from the public and the utilities for increasing fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that raising fees by a factor of three in a single increase is too much at one time for most small systems to bear. LCRA requested that the TCEQ consider implementing the fee increase in a phased-in approach to allow adequate time for LCRA and other affected entities to undertake rate increases and incorporate the new fees into their respective FY budgeting. Wylie asked if the fee increase could be phased in gradually over successive years to allow entities to gradually adjust to and adequately plan for changes. Austin and Luminant commented that the increase in fees should take a phased-in approach. The Utilities and Denton commented that when the time comes for TCEQ to increase fees, it should do so in a phased-in approach with ample time for input from the public and the utilities. The Utilities and Denton commented that cities and local governments typically increase rates in a phased-in approach, and the TCEQ should follow that same lead. Shin-Etsu commented that such a substantial increase in fee should be phased in gradually over a span of years instead of implemented immediately. Talty WSC does not believe that the water system should suffer for poor planning on the part of TCEQ and suggested that these rates should have been increased gradually since 2001 not taken all at once. El Paso requested that the implementation of the fees be phased in over five years. Sugar Land commented that rather than being phased in, the proposed rules would represent an immediate, appreciable increase. Sugar Land stated that municipalities across the state are already dealing with various other increases related to rising cost of materials, regulatory mandates (e.g. implementation of groundwater conservation districts/subsidence districts) and other factors. Sugar Land encouraged the commission to review the extent of the fee increases and the method by which they are determined from year to year and recommended a phased increase in revenue based on a set fee structure to reduce the impact to local governments and their customers.

The fund balance in Account 153 is inadequate to allow the commission to implement a phased-in approach. Current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of water program activities in FY 2010 - 2011 as it is currently performing. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Arlington Water Utilities opposes the single year large increase especially at a time when all cities are faced with shrinking revenues due to the economic conditions. Arlington Water Utilities commented that when program funding increases are needed, regardless of the source of funding, the increases should be programmed to avoid the shock of very large single year increases. Arlington Water Utilities stated that it pursues a very proactive operational and capital planning system to ensure that the annual cash flows and the periodic rate and tax increases will not unnecessarily and adversely impact the citizens of Arlington in a single year and urges the commission to adopt a similar approach to its program planning.

The commission recognizes the value of prior planning and appreciates the proactive approach of Arlington and other regulated entities. The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. Over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require either fee increases or reduced services. More recently, the agency has held several presentations to statewide water

associations to inform them of the water funding shortfall and to inform them that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The legislature also enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The general revenue appropriation in addition to changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

TCC commented that the two bills introduced in the House and the Senate set the maximum fee limit at $200,000 which represents up to a $125,000 increase (or 167% increase) from the current cap. TCC noted that if a facility remains capped this $125,000 increase would occur in a single year. TCC commented that if the statutory limit is increased, a phased implementation approach should be used to graduate towards the revised statutory limit so that such a large increase does not occur in a single billing cycle.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach. Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in water fee rates, the agency would not be able to maintain its current level of water program activities.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. In addition to general revenue appropriations, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to these comments.

TCC stated that the timing of the decision on fee rates is critical for regulated entities so that appropriate budgeting decisions can be made. TCC stated that for those regulated entities on a calendar FY, the current state billing cycle, which marks October as the beginning of the FY, is very problematic for timely budgeting. TCC recommended that the TCEQ move the billing period for the water quality fees to the first quarter of the calendar year (second quarter of the State of Texas FY) to allow a greater flexibility for all regulated entities to budget appropriately. TCC commented that for entities on a calendar FY increases in the CWQ fee present an additional burden because the substantial increase over budget is incurred in the current FY since the TCEQ bills these fees in October at the beginning of the State of Texas' FY.

The agency depends on the revenue from the CWQ account to maintain the budget through the early months of the FY. It is not financially feasible to modify the bill date due to nature of the agency's budget cycle. The agency would have been insufficiently funded in the early months of the FY if the fee increase did not take place when planned and would not have been able to perform the same level of water program activities as it is currently providing. The commission made no change to the rule in response to this comment.

Odessa commented that it opposes the proposed dramatic increase in fees because cities are already dealing with the increasing costs related to chemicals, electricity, maintaining qualified personnel, compliance with regulations, and failing infrastructure. Odessa commented that as an enterprise fund, it will have no choice but to pass all of these increased costs on to our utility customers, many of whom are dealing with the impacts of the recession. AECT suggested that at a time when businesses are under significant economic pressure and uncertainty the TCEQ's proposal to increase water fees needs to involve serious consideration of possible ways to reduce the proposed magnitude of the increases in water fees. EI Paso recognized the need for the commission to increase fees but commented that at this time it is not practical for the utility to raise rates to cover these expenses because of both political and economic realities. Rosenberg commented that because of the recent economic downturn the city is not in a position to consider increasing rates to cover the proposed fee increases and that it does not make good economic sense to increase fees at this time. Rosenberg suggested that the commission seek a fee increase after the economy fully recovers and ratepayers again have some disposable income available. Agua SUD stated that it understands the reasons for the increases and stated that the commission performs a valuable service to all of Texas, but commented that these increases are difficult to implement from one day to the next. Sugar Land commented that the economic downturn has led to decreasing system revenues and budget shortfalls and that such a marked increase in regulatory fees in a time when resources are already stretched thin represents an untenable situation. One individual commented that in this bad economic time people have to prioritize and reduce spending and the individual believes that the commission should follow this example. Wylie commented that municipalities are being adversely affected by the current economic status of the nation and that the PHS fee increase represents a substantial impact on the Water Division's annual budget at a time when economic conditions require that we operate as frugally and efficiently as possible while still meeting all the requirements to deliver potable water to our

customers. Austin commented that the time is not right for such a dramatic increase in fees in these times of economic hardship when their customers are losing jobs or have had to take pay cuts. Houston commented about the timing of the rule during an economy when people across their city and across the state are losing jobs and stated that it would have a negative impact on Houston and other cities in the state. Valley Mobile Home commented that in this time of economic stress in our country and our state that the commission needs to tighten its belt like the rest of us and not increase any fees at least until things get back to normal. Valley Mobile Home suggested that the commission join in the spirit and cut salaries to help out. Kamira commented that this is absolutely the wrong time to do this and that TCEQ and the State of Texas should follow the example of families and cut back on something. Kamira requested that the commission instead decrease fees through lay offs or decreased reporting to the agency and get in line with the problems the general public is going through in this time of economic instability. Kamira stated that the fee increase will lead to the water system providing less customer service and a negative opinion of the commission. Kempner WSC commented that these fees are not justified and must be reevaluated particularly with the current economic situation. SEC commented that the last thing we need is more fees in a depressed economy. Shin-Etsu objects to the increase in fees because of the inappropriate timing of the increase as well as lack of tangible benefits to the fee payer. Jefferson stated that it understand the TCEQ has refused to explore reducing costs and commented that TCEQ should look closely to reduce its costs like every other governmental entity in Texas.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, federal and state laws to which the commission is subject require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, electronic discharge monitoring reports (eDMR), and automated internal processes.

The commission has a publication, *Funding Sources for Utilities*, RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at *mtaunton@tecq.state.tx.us*. Additionally, small businesses and small local governments can contact the agency's Small Business and Environmental Assistance Division for compliance assistance at (800) 447-2827. The commission made no change in response to this comment.

UGRA asked that given the state of the economy the commission consider maintaining the status quo on fees for the foreseeable future. UGRA stated that any increase in fees will ultimately impact the consumer who is already reeling from economic blows. UGRA asked that the commission consider alternative fiscal management strategies that do not require fee increases.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, federal and state laws to which the commission is subject require that the commission carry out specific tasks to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting and eDMR as well as automating internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

The Utilities and Denton commented that cities are facing budgets cuts, decline of local business activity, a freeze on filling vacant positions, and other factors that combine to make the budget process a challenge for cities and water utilities.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. More recently, the agency has held several presentations to statewide water associations to inform them of the water funding shortfall and to let them know that there would be a rule proposal made before the commissioners in early 2009 to start the fee rate changes. The commission made no change in response to this comment.

Luminant commented that the proposal seems premature, since the legislature is currently in session, appropriations have not been set, and there are a number of related bills under consideration. El Paso requested that the commission consider the timing of implementing any new fees. El Paso stated that it is their understanding that the fees would be implemented in August which is half way through their FY and as such have not budgeted for any fee increase this FY. El Paso requested that the proposed increase not begin until all utilities have had a chance to adjust their budgets for their next FY budget. Luminant commented that the timing is atrocious from a budgetary standpoint and that it is inappropriate to impose a dramatic increase within a budgetary year.

While the fee increases are significant, over the past several years the commission has made it widely known that the impacts

of a depleted Account 153 fund balance and reduced general revenue appropriations would require fee increases or reduced services. Waiting until after the session would not have given these entities any advance notice of and, therefore, no ability to plan for increased fees for their FY 2010 budget cycle. The commission wanted to provide as much notice as possible for potentially affected fee payers as they moved through their budget planning cycles.

The CWQ fee bills will be mailed in October 2009 with the PHS fee bills following in November and the WUF bills being mailed in January 2010.

The commission is raising fees at this time because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue performing the same level of service for its water program activities in FY 2010 - 2011 as it is currently performing. Without the additional fee revenue, it would be required to cut program activities. This could affect, for example, permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and reducing the number of investigations at public drinking water systems and wastewater treatment plants. The commission made no change in response to this comment.

Taylor Landing commented that a further increase, unjustified by improved services, is unwarranted and suggested that governmental agencies, including TCEQ, start tightening their belts and live within their budgets like everyone else. Taylor Landing suggested that the solution to the commission's need for more funding is not to increase user fees, rather, it is to decrease operating expenses. Shin-Etsu would prefer to see the services and obligations of the TCEQ decrease before significantly raising the fees in dismal economic times.

Over the past several years, the agency has reviewed its water program activities and made significant efforts to streamline processes and to use technologies to create greater efficiency. Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. The agency will continue to develop more efficient processes.

Historically, the commission's water programs have been supplemented with general revenue funding. Over the past two bienniums, the amount of general revenue appropriated to the agency has decreased. It has been replaced with Account 153 appropriations which has depleted the fund balance. Without an increase in its water fee rates, the agency would not be able to maintain its current level of water program activities. The commission made no change in response to this comment.

Plainview Public Works asked if the greatest impacts to TCEQ funding be more accurately identified and addressed before everyone in the state is asked to contribute more money for the same service. Odessa commented that increases in fees for all 30 of the fee funds in Account 153 should be considered, rather than placing the burden of the budget shortfall on the three of the 30 funds previously listed. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD stated that TCEQ informed them that there are 30 or more fees that support the TCEQ but only three were chosen for massive increases. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD support looking at all of the fees for equitable increase not just the ones in the current rule package. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it believes that at least some legislators recognize that legislation is a necessary part of this proposed rule package given the filing of bills to increase the cap limits. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that since legislative action will be needed to achieve a proper balance, it seems more prudent to look at all fees not just the three in the current proposal. The Utilities and Denton suggested that TCEQ further evaluate all 30 fees for potential increases, even those requiring statutory change, in an effort to spread the impact among those entities bearing the cost of TCEQ funded water-related programs. Luminant commented that the new revenue raised by the fees in this rule proposal may not go to support the programs related to the targeted revenue stream and will result in an inequitable burden on those who are part of that targeted revenue stream.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to those fees are outside of the commission's direct control and also the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Cleburne commented that there are insufficient checks in the operating budget for the commission to ensure that only the amount of fees absolutely necessary to operate will be collected. Cleburne commented that there are many programs that will be subsidized by this fee increase that do not appear to benefit the city.

As a state agency the commission is accountable to all Texans in addition to state and federal authorities. The commission submits quarterly performance measures to the Legislative Budget Board related to its water programs. This information is also required by the legislature in the commission's biennial appropriation request. Additionally, certain water programs require the commission to report regularly to EPA regarding its performance. The amount of general revenue and Account 153 funds appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by

the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, added statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. Though most of these activities have a fee that can generally be associated with these activities, several do not, such as TMDLs, river compacts, and groundwater protection. In these instances, as well as in addition to supporting the agency's overall water program, the statute authorizes the use of revenue deposited to Account 153. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

Carrollton, Public Works Department asked that the commission reconsider the proposal and that the commission reengage with the Texas Legislature to increase their appropriations' support for these critical programs. Carrollton, Public Works Department commented that they realize this may be difficult so they also suggest that the commission comprehensively address all the water programs' budgetary needs and ask for statutory rate relief in all those needed to pay their own way. Mayor Branson recommended that the commission accurately forecast the appropriate budget shortfalls in each of the 30+ water program service fees and ask for statutory fee relief within each program.

The commission has sufficient appropriation authority to manage its water programs. The shortage is the amount of fee revenue collected by the agency. The current fee revenue deposited into Account 153 does not support the appropriations and obligations from the fund; therefore, an increase in fee rates is necessary to support current appropriations from the fund. The amount of general revenue received by the agency is determined by the legislature. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The fees in this rule will impact the majority of water fee payers throughout the state. Other fees were not selected because they do not generate enough revenue to impact the shortfall and do not have as consistent revenue streams. The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

AECT commented that any necessary increases in water fees should be assessed equitably across all fee payer sectors. By that, AECT means that the water fees for a fee payer sector should be based on the agency resources that are needed for management of the water quality programs for that sector.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The fees in this rule will impact a broad segment of regulated entities throughout the state. The commission made no change in response to this comment.

Carrollton, Public Works Department recommended that the appropriate solution is that budget shortfalls should be proportionally spread between all the water programs that can't cover their forecasted bills. Mayor Branson and Carrollton, Public Works Department stated that continuing down the proposed path will distort the relationship between actual costs of the program and the fees to recoup those costs. Carrollton, Public Works Department commented that this will likely also affect organizational assessments to review operational effectiveness and cost efficiencies.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. The commission made no change in response to this comment.

Mayor Branson commented that if not tax supported, each program should pay its own way. Mayor Branson and Carrollton Public Works Department commented that the city must pay for the services used but the water programs the city doesn't use should not be part of our city's obligation. Lake Corpus Christi RV commented that the fees seem like an attempt to support shortcomings of other departments.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts,

water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

SAWS recommended that the legislature keep funding the commission with general revenue while the following items are considered: a phased-in approach to the fee increase and that any increase in fee structure be designed to equitably spread the burden across all water-related programs and activities or identify target increases based on the sum. SAWS asked that it be clearly demonstrated that the fees go to the programs they are intended to cover.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

At this time, the commission does not have an adequate fund balance in Account 153 to implement a phased-in approach because the past two bienniums have depleted the fund balance. The current fee revenue is not sufficient to support current appropriations from Account 153 and unless the commission raises water fee rates the agency will not be able to perform the current level of water program activities.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this statutory authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resources is an important one to every Texan. The commission made no change in response to this comment.

TAB commented that it is appropriate that the commission consider whether those businesses that hold wastewater permits that would be subject to significant fee increases truly impose a cost on the agency or receive a benefit from the commission's performance of its regulatory activities equivalent to an annual cost of conceivably $200,000. Absent such a finding, it is the position of TAB that further adjustments in other fees, including the PHS fee, be considered because it is clearly the most broadly based and it comes the closest to functioning like the general revenue that is no longer included in the TCEQ budget. TAB commented that if the legislature allocates little general revenue to TCEQ water programs, it should be incumbent on the agency to maximize the collection of needed revenue from the source that most closely resembles general revenue.

The commission has the statutory authority to use the fees deposited in Account 153 to protect the water resources of the state. The fee increase is intended to provide enough funding for the commission to be able to carry out its regulatory responsibilities related to its water programs. The commission made no changes in response to this rule.

Rosenberg suggested that the commission ask the legislature to provide additional funding or that the agency perform a top to bottom review and eliminate expenditures to overcome the projected shortfalls, like local governments.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, and eDMR, and as well as automating internal processes. However, water program activities have not been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it will be required to cut program activities. The commission made no change in response to this comment.

Odessa commented that all taxpayers receive benefits through water and wastewater services; therefore, Odessa suggested that the TCEQ strongly consider financing their budgetary shortfall, at least in part, through Texas general fund revenues and any available federal funds.

The agency is currently using federal funds to support water programs and these funds were taken into consideration by the commission when developing the fee increases. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

Calpine commented that given the $75,000 statutory cap on the CWQ fee, any increase in the fee would be absorbed solely by

regulated entities currently paying less than the cap. Calpine suggested that the commission could continue to lobby the legislature to approve an increase to the current cap (i.e. HB 1433 and SB 2316); encourage the legislature to reinstate the original water quality program funding for Account 153; or, delay adoption of any fee increase until the legislative session has ended and all associated changes have been evaluated.

Since the cap is set in the TWC and cannot be changed without legislative action the commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. The commission provided information to both the Texas House and Senate during the 81st Legislative Session regarding the impacts of raising the CWQ fee cap. The agency has also worked with the legislature to determine general revenue appropriations.

During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. In addition to the appropriation of general revenue, the changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Mayor Branson commented that the Texas Legislature should provide required appropriations for a critical state service and not progressively reduce support, but understands that the legislature has this right. GBRA does support an increase in the commission's funding but through increased general fund appropriations rather than increased regulatory fees. GBRA believes this approach is much more fair and appropriate since all the citizens of the state benefit from the commission's programs. TCC commented that since all Texans benefit from the commission's programs that a more equitable approach is to obtain significant funding from general revenue. TCC encouraged TCEQ to continue to seek funding commensurate with historic funding levels from general revenue given the benefits to the citizens and the economy of the state. Arlington Water Utilities commented that all citizens of the state benefit from the water and wastewater programs therefore Arlington Water Utilities urges the commission to consider a different approach than the historical user fee, namely funding the programs from the general revenue funds of Texas. Arlington Water Utilities urges the commission to work with the legislature to adopt methods to pay for the majority of the commission's water and wastewater programs out of the general revenues of Texas. LCRA requested that TCEQ delay adoption of the fee increase until after the legislative session, so that any general revenue that may be made available to TCEQ can be factored into determining the timing and level of necessary fee increase. LCRA stated that general revenue funding to supplement a reduced or phased-in fee increase would provide a more balanced approach to paying the cost of TCEQ programs by all Texans who benefit from these programs but are not subject to the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD believe that there is sound policy for making the general revenue the dominant funding source and the user fee the lower secondary source. Austin commented that the services that the commission provides to the state are beneficial and should be funded with the general relief fund with supplemental funding coming from the fees. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that the current proposal is not likely to strike the proper balance between general revenue that is used to fund the TCEQ and fees that are used to fund the TCEQ.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

In proposing increases to the PHS fee, the CWQ fee, and the WUF, the agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one group of fee payers. The fee increases in this rule will be used to protect the water resources of the state and were developed as the most effective way for the agency to adjust revenue levels while spreading the financial burden as equitably as possible among those who benefit from clean and reliable water resources. The commission made no change in response to this comment.

AEP requests that the TCEQ explore all possible sources of funding for its water program. AEP asks that the TCEQ make an effort to convince the Texas Legislature to provide as much general revenue funding as possible for Account 153. AEP also requests that the TCEQ request additional funding from the EPA if this has not already been done. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD recommended that the Texas Legislature appropriate the proper level of funding and that all fee increases be reviewed legislatively to assure a proper funding balance. The Utilities and Denton commented that it is their position that a more balanced approach for underwriting the cost of the TCEQ to carry out these valuable programs should come from the Texas general revenue funds and supplemental federal funds, such as the Safe Drinking Water Act grants, rather than specific use fees. Rosenberg commented that the commission should seek additional funding from the federal government to carry out the various EPA mandates being handed down. The Utilities and Denton commented that it makes more sense than the current rule proposal to reprioritize and reallocate existing general revenue and federal funds that assign a higher priority to the protection of the public health and the viability of the Texas economy. The Utilities and Denton commented that the general revenue funding stream should account for the majority of the TCEQ water program funding, with fees only as a supplemental source.

The commission did consider all of its water fees when determining how to best ensure that it can meet its financial obligations to continue to carry out its water-related activities beginning in FY 2010. The commission did not select fees that require a statutory change at this time because changes to them would be outside of the commission's direct control. Additionally, the majority of those fees do not generate the amount of revenue necessary to cover the revenue shortfall.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Collectively, the water programs of the commission protect public health by ensuring clean and adequate water supplies. In this rulemaking, the agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector or company.

The commenter also suggested that the agency request funds from the EPA to support its water program activities. The commission does seek and receive federal funds from EPA; however, such funds are not sufficient to cover agency programs. The commission made no change in response to these comments.

Brownwood stated that the state and federal government want to put limits on how much utilities can tax and charge for fees and asked what will happen to utilities if a utility's fees to the state are increased and its ability to charge what is needed to maintain its own utilities is reduced. Brownwood commented that TCEQ needs to cut its costs and have the legislature fund the TCEQ back to its original level.

The commission is not aware of any initiative from either the state or federal government that would put limits on how much utilities can tax and charge for fees. Section 291.31 of the commission's rules allows a utility to charge reasonable and necessary expenses for rendering service to rate payers. It is anticipated that to the extent affected fee payers need to increase rates to their customers through a tariff change, such change could be requested pursuant to §291.21(b)(2)(A)(iv), which authorizes the executive director to approve minor tariff changes in certain instances based on governmental requirements beyond the utility's control.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has implemented electronic processes including electronic permitting, eDMRs, and automated internal processes.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities. The commission made no change in response to these comments.

WEAT supports full funding of the TCEQ water quality programs and fully supports the agency's attempt to provide for full funding of these programs. However, WEAT believes that CWQ fees should remain at the current levels and the balance of funds needed for agency water quality programs should come from general revenue appropriated by the Texas Legislature.

The commission acknowledges the comment in support of the agency's attempt to provide full funding to its water programs.

The amount of general revenue and Account 153 appropriated to the commission is determined through the legislative budget process based on various agency and committee recommendations. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

One individual commented without the past five to ten years of records listing revenue streams and expenditures for the accounts requesting fee increases the reasoning behind a higher fee request simply looks like propaganda.

The commission receives appropriation authority from the legislature to fund its water programs with general revenue and Account 153 funds. Over the past two budget cycles the amount of funding from general revenue has decreased and appropriations from Account 153 have increased. Overall, water funding has been relatively constant but the source of the funding has shifted more heavily toward water fee revenue. The commission has been using the Account 153 fund balance to cover the revenue shortfall from water fees. Since the fund balance has nearly been depleted and general revenue funding has continued to be limited, the agency must raise fees to maintain the same level of water program activities as it is currently providing. The following information presents the funding breakdown between general revenue appropriation and water resource funding (includes fund balance and revenue) for the agency's water programs.

The agency received $59.5 million in general revenue funding and $45.7 million in Account 153 funding to fund the 2000 - 2001 water programs. The agency received $60.5 million in general revenue funding and $49.1 million in Account 153 funding to fund the 2002 - 2003 water programs. The agency received $54.5 million in general revenue funding and $50.3 million in Account 153 funding to fund the 2004 - 2005 water programs. The agency received $9.6 million in general revenue funding and $90.4 million in Account 153 funding to fund the 2006 - 2007 water programs. The agency received $20.7 million in general revenue funding and $90.2 million in Account 153 funding to fund the 2008 - 2009

water programs. The commission made no change in response to this comment.

Carrollton, Public Works Department is concerned about the proposed water program fee increases in the proposed rule, as well as pending legislation to further increase the CWQ fee cap. Carrollton, Public Works Department is supportive of the essential services provided by TCEQ for the water programs mandated by their roles and responsibilities but disagrees with the methodology and process currently proposed to meet Account 153 obligations.

This rule enables the agency to adjust fee rates according to the amount of general revenue and Account 153 appropriated to the commission for water programs. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

This rule will give the agency the ability to adjust rates to guarantee sufficient funding is available for the commission's water program activities. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The commission made no change in response to this comment.

Luminant acknowledges that there may be a need for some increase in fees, but disagrees strongly with the process used, the excessive increases proposed, and the inequality to the targeted fee payers. Luminant commented that without knowledge of the methodology used, it is difficult to dispute or support the increases proposed and that it is equally difficult to understand the disparity of the proposed increase by category. Therefore, Luminant requests that the commission: provide greater detail, clarity, and justification on current expenditure from Account 153; provide greater detail, clarity, and justification on the need for the proposed increases; provide greater detail and clarity on how the percentages were derived for each category; provide greater detail and clarity on how these increases in fees are distributed across the various groups of fee payers, and specifics on how the increased revenue will be used; equalize the percent increase across all wastewater categories, or provide justification on any variance to a standardized increase; set the fee structure at fixed amounts to allow a level of certainty for both the agency and the fee payers; and, keep the multiplier found in §21.3(b)(7) at 1.0 or remove it from the regulation as it is neither necessary nor useful.

The commenter asked for greater detail on current expenditures from Account 153. The environmental programs that the agency supports from Account 153 include: water permitting functions, Water Rights, Groundwater Protection, bays and estuary programs, TMDLs, water quality monitoring assessment / standards, wastewater, Clean Rivers Program, and Onsite Septic Systems. For the past two bienniums the agency has been appropriated approximately $90 million per biennium for its water programs.

The commenter requested greater detail on the need for the proposed increases. Without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. The water programs have always depended on general revenue to supplement their costs. The general revenue appropriated to the commission for water programs have decreased from the 2004 - 2005 amounts. This rule will enable the commission to generate enough revenue from Account 153 to support water programs with the continued level of general revenue funding. This will allow the commission to maintain its current level of service for water programs. Persons interested in viewing historical information concerning the commission's operating budget can go to a Web page entitled Where the Money Goes at *http://www.window.state.tx.us/comptrol/expendlist/cashdrill.php*.

The commenter asked for greater detail about how the percentages were derived for each category. The fee rates for the proposed rule were based on a worst case projection requiring an additional $15 million annually from the CWQ fee and on the assumption that the agency would not receive any general revenue from the legislature.

The commenter asked for greater clarity regarding how the increases in fees will be distributed and how the revenue will be used. When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority, revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. These activities include water rights, storm water, public drinking water, TMDL development, water utilities, wastewater, river compacts, water availability modeling, water assessment, CAFOs, sludge, and groundwater protection. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The revenues will be used to make up the projected shortfall in the revenue to support the agency's water programs.

The commenter requested that the commission equalize the percent increase across all wastewater categories. The commission appreciates the desire to have any increase applied equally across all classes of fee payers. In an effort to have all classes of CWQ fee payers bear generally the same percentage of the increase, rates for all of the factors were increased by an average of 56%. Because the class of dischargers with uncontaminated flow had a greater number of fee payers at the cap, the rate for that factor increased at a greater percentage than the average. The amount applied to each factor will be determined by the annual appropriations and other costs from Account 153 and will be applied uniformly to all permits subject to the particular factor being applied.

The commenter asked that the commission set the fee structure at fixed amounts. The ranges set for each factor provide

the commission the ability to adjust CWQ fee rates to the level needed to generate enough revenue to maintain its current level of water program activities. Fee rates will be set based on appropriations made to the commission and any adjustment to the cap made by the legislature. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers.

The commenter asked that the commission keep the multiplier at one or remove it. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier to be applied in the upcoming FY. The commission made no change in response to these comments.

Cleburne commented that without more detail and specificity in the annual requirement, the city will have to plan for the largest potential fee to be collected each year and simply hope that the commission will adopt a budget that will not require such a large annual fee. Cleburne commented that this uncertainty in cost is not something the city can, or should budget for without greater certainty. Sugar Land commented that the change from a straight fee structure to a variable system whose only indicators are maximum potential costs, which are in turn subject to a variable multiplier, compounds existing budget issues. Sugar Land commented that this causes cities to try to budget for what are essentially moving targets. Sugar Land commented that variable fees require local governments to budget for the worst case scenario and that the opportunity costs of this process are potentially enormous as funds desperately needed for other projects are tied up for the potential worst case. Luminant commented that even if the fees are assessed at different rates from year to year, the entities that are part of the Water Quality Fee revenue stream will of necessity be forced to budget the maximum in anticipation of possible changes in the assessment. Luminant commented that this situation will not only increase their costs but will also introduce unwanted ambiguity to the ever tightening budget processes. Grandview commented that it is extremely difficult to adjust to the wide range of the possible fees. Grandview stated that as a municipality it must formulate a budget designed to meet its existing projected operation costs. Grandview stated that with a variance of up to four times the minimum to the possible maximum Grandview finds itself either under budgeting or over budgeting and imposing an unneeded increase on our rate payers. Grandview requested that the commission establish firm figures that would allow Grandview to project costs during its budget process.

Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive. The fee rates will be set at a rate that will generate sufficient revenue to meet operating needs. The commission recognizes the need for advance notice in the budgeting process and will work to let fee payers know what their rates will be as early as possible each biennium. The agency's overall water fund appropriations have been relatively constant the past few FYs and it is anticipated to remain so in the future. The consistency of appropriation would enable fee payers to determine their budget before rates are released in summer. The rates would only be impacted by significant changes to appropriations to the commission for its water programs. The commission made no change in response to this comment.

Sugar Land commented that while they understand the need to adequately fund the commission's various water programs, the extent of the costs and the variability of the rate structure in the proposed rules represent a significant unfunded mandate and budgetary impediment to local governments.

The commission recognizes the need for advance notice in the budgeting process and will work to let fee payers know what their rates will be as early as possible each biennium. The commission is taking action now to provide itself the flexibility to raise fees because current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of service for its water program activities in FY 2010 - 2011 as it is currently providing. Without the additional fee revenue, it would be required to cut water program activities. The commission made no change in response to this comment.

Luminant stated that the background for the proposed rule states that it is the intent to eliminate the fixed dollar amount applied to each factor and replace it with a "maximum amount that could be assessed." Luminant fears and expects that the "maximum amount that could be assessed" will become the de facto rate.

The agency's authority to expend funds for its programs is limited to its appropriation authority granted by the legislature. For the CWQ, the agency replaced the fixed dollar amount with a range for each factor to enable the agency to adjust fee rates to respond to the amount of general revenue and Account 153 funds appropriated to the commission for its water programs. The amount assessed for each factor would be applied uniformly to all permits subject to the particular factor being applied. The commission made no change in response to this comment.

Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that if the rate must rise by 10% overall to generate the funding to cover the anticipated shortfall, then the burden of the 10% needed from an entity covered by an applicable cap will fall on the small utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, and Ore City commented that raising the cap by less than the amount of the percent of increase only shifts the burden to the small systems to raise more.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to $2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection.

Regarding the CWQ fee and WUF the cap is set in the TWC and cannot be changed without legislative action. The commission designed the fee rates to be as equitable as possible while still ensuring that the fees would generate sufficient revenue to cover the agency's revenue shortfall. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread

more broadly across the group of fee payers. The commission made no change in response to this comment.

Northeast Texas MWD commented that the amendment to the formula for the WUF significantly impacts the providers in lowly-populated areas (rural) in water abundant areas. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that they believe that the small utility systems may be responsible for an inappropriately large proportion of budget funding due to the caps afforded large utilities. Lone Star, Mayor Simpson, Hughes Springs, Jefferson, Pittsburg, Ore City, and Northeast Texas MWD commented that it is hard to accept why a preference would be shown to large systems to the detriment of the small systems.

The proposed WUF rate changes no longer include a price break for water right holders with larger water rights. Under the previous fee structure, larger water right holders received a lower overall fee rate per acre-foot than water right holders that were under the acre-foot threshold. The fee rate in this rule will treat all water right holders the same regardless of size.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

Additionally, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000. The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

New Ulm WSC commented that it is a very small rural community and that existing fees and assessments are already a burden to our system and having these increase will make it more of a burden. New Ulm WSC requests that there be some type of adjustment for very small utility companies. Pleasanton requested that in setting fees the commission consider the size of the entity and number of customers. Pleasanton commented that if the rates go up for the smaller entities, such as the City of Pleasanton, they should go up proportionally for the larger ones. L&L commented that it manages five small water systems and they can not afford the increases and that fee increases are not necessary at this time. L&L also commented that fees are already too high for small water and wastewater providers.

Regarding the PHS fee the commission's goal was to make assessment of the PHS fee more equitable on a per connection basis. The commission did this by increasing the range of the second tier of the fee payers to 161 connections and by removing the formula on the third tier and replacing it with a flat cost per connection fee of up to $2.15 per connection per year. Under this rule all utilities with 161 connections or greater will pay the same fee per connection. This eliminated the possibility of larger utilities paying only $.11 per connection and placing a larger burden on smaller systems.

The commission has a publication, *Funding Sources for Utilities*, RG-220, that is available on-line. Additionally, the commission has a program to provide utilities with free assistance to discuss available funding sources for infrastructure repair and replacement projects. If a utility would like to participate in the agency's Financial, Managerial, and Technical Assistance Program, the utility can contact Margot Taunton at (512) 239-6403 or at *mtaunton@tecq.state.tx.us*. The commission made no change in response to this comment.

SAWS and the Utilities commented that it is opposed to these dramatic fee increases and believes that the large utilities will be responsible for an inappropriately large proportion of budget funding. As an example, the Utilities and Denton stated that the fiscal note with the Chapter 290 revisions states that 30 city-owned systems with more than 37,000 connections will account for $8.2 million of the overall $14.2 million increase in the current economic downturn and without the ability to clearly communicate an increase in public health benefits associated with the cost increase to customers. Denton believes that it will be responsible for an inappropriately large portion of budget funding.

The larger municipal utility providers account for 47% of the state's total PHS fee connections. Under this rule the larger municipal utilities will pay a fee that is based on the number of connections. This rule changes the complex formula that decreased the fee per connection cost as the number of connections increased. The previous formula-based system allowed the larger systems to only account for 18% of the total amount of fee assessment while serving 47% of the population. This rule simplifies the fee calculation for all water systems and does not require smaller systems to cover a higher percentage of cost in relation to larger systems. The commission made no change in response to this comment.

El Paso commented that the services it receives from the commission do not justify the level of the increase and that the commission seems to be using fees charged to big cities to cover other areas of value to the commission.

The fees in this rule are based on specific factors that are in a permit or authorization. Larger cities use more water resources and are therefore assessed more than smaller entities. The cost is being spread equally across the various fee payers based on permits or authorizations for water and wastewater.

When the commission went through the Sunset process in 2001, the legislature determined that water-related fees collected by the agency would, for the most part, be deposited to Account 153. HB 2912, 77th Legislature, provided statutory authority that revenues deposited to that account would be available to protect water resources in the state. Under this authority revenues deposited to Account 153 have been used to support the activities associated with the state's water programs. This statutory authority recognizes that these water-related activities benefit people across the state and that the goal of protecting the state's water resource is an important one to every Texan. The commission made no change in response to this comment.

New Ulm asked that the commission consider not increasing the CWQ fee or the PHS fee.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic sit-

uation. However, the commission is required to follow and to enforce state and federal environmental laws and as such is required to carry out specific tasks under these laws to safeguard the environment of the state. In order to carry out those tasks the commission needs to ensure that funds exist to pay for what it is required to do. The commission made no change in response to this comment.

El Paso requested that the commission lower the requested fee amount for both the CWQ fee and the PHS fee to a 100% increase over the current fees and that the commission support lowering the cap proposed in HB 1433 to a corresponding value.

The agency intends to limit the burden on fee payers to only the amount necessary to support the commission's water program activities. During the 81st Legislative Session, the legislature enacted legislation to increase the statutory cap set in the TWC for the WUF and the CWQ fee from $75,000 to $100,000. That legislation also provides for annual adjustments based on the consumer price index up to a maximum amount of $150,000.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010-2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The changes in the cap will allow the agency to adjust rates so that the impact of the fees is spread more broadly across the group of fee payers. The commission made no change in response to this comment.

Shilk commented that during bad economic times they did not agree with increasing any of the fees in the rule proposal. Shilk commented that increasing fees to encourage conservation is nothing more than a tax. Hardin County WCID commented that it does not see the value to the increased fees and that people did not have an opportunity to vote regarding the new fees which Hardin County WCID feels are hidden taxes. One individual commented that the fees are really taxes and that this is not a good time to ask for money when people's budgets are so stretched. Mayor Branson commented that the commission response to its budget shortfall of raising only three fees, converts what are now fees into taxes on the local government utility. Brownwood commented that the fact that TCEQ general revenue has declined causes utilities across the state concern because it looks like another way to increase tax revenue. Brownwood stated that general fund revenue is generally in form of a tax. Brownwood commented that raising the consolidated water quality fee is just a hidden tax.

This rulemaking does not create a new tax; rather, it is an increase in fees that is intended to provide a portion of funding for the commission to be able to carry out is regulatory responsibilities related to its water programs. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. The fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

SAWS commented that the fee increase is not balanced. SAWS gave the example of a large 100 mgd wastewater treatment plant and a one mgd wastewater treatment plant and stated that there should be a lower unit cost calculated into the fees for those efficient systems.

The CWQ fee uses many factors in determining the fee amount. The factors include flow as well as the pollutant values assigned. One of the parameters is contaminated flow measured in mgd. A higher flow under this parameter equates to a higher fee assessed. The commission made no change in response to the comment.

Brownwood commented that it is concerned that increased fees will ensure the same level of service from TCEQ. Brownwood stated that as cities all over the nation look at their budgets in tough times, they look at funding essential services and cutting other non-essential services. Brownwood commented that the TCEQ and State of Texas should do the same. Brownwood commented that one program, for example, that is non-essential is the Industrial Pretreatment Program. Brownwood stated that utilities are already governed by a permit that sets standards for the utility's effluent discharge. Brownwood questioned why utilities that are already controlled by a permit must also have regulations to control effluent. Brownwood stated that this program cost utilities and industries hundreds of thousands of dollars each year to regulate effluent that is not causing a problem.

Over time the commission has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. However, water program activities have never been the recipient of excess funds and general revenue has been used to supplement the agency's costs for its water program activities. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations at public drinking water systems and wastewater treatment plants.

The commenter suggests that the commission eliminate nonessential activities and cites the Industrial Pretreatment Program as an example. The EPA delegated the pretreatment program to the commission's predecessor agency on September 14, 1998. As part of the delegation, the commission is required to operate and manage a program in accordance with 40 Code of Federal Regulations Part 403 to properly regulate publicly owned treatment works (POTWs). The pretreatment program is to prevent the introduction of pollutants into a POTW by industrial users that may interfere with, pass through, or contaminate the sludge since POTWs are not designed to treat toxics in industrial or even some commercial waste. To address discharges from industries to POTWs, EPA established the national pretreatment program as a component of the National Pollutant Discharge Elimination System permitting program to require industrial and commercial dischargers to treat or control pollutants in their wastewater prior to discharge to POTWs to prevent serious problems. The actual requirement for a POTW to develop and implement a local pretreatment program is a condition of its Texas Pollutant Discharge Elimination System

wastewater discharge permit. The commission made no change in response to this comment.

While AEP understands the need for the agency to increase fees, AEP also contends that the proposed increases are higher than necessary. At a time when businesses are under significant economic pressure and uncertainty, AEP believes that the TCEQ's development of proposed rules to increase water fees under Chapter 21 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed. For example, AEP requests that the TCEQ conduct a formal audit of its water programs that are funded by Account 153 to ensure that such programs are being operated as fiscally efficient as possible.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. Over the last several years, the agency has reviewed its water program activities and has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional fee revenue, it would be required to cut program activities. The commission made no change in response to this comment.

L&L suggested that TCEQ delegate some of its duties to the water conservation districts and let them regulate water quality, public health, and water use assessment. L&L commented that local control is the recommended process.

The commission does not have the authority to delegate duties to districts in the manner suggested. Additionally, water districts are only able to operate to the extent authorized under the TWC, other state statutes, or by a special act of the Texas Legislature. The TWC does not grant districts broad authority to regulate water quality, public health or water use assessment. The commission made no change in response to this comment.

Grandview commented that if the state imposes fees on local governments that the local government must either absorb or pass on to its end users then the state has created a fiscal impact. Grandview commented that it is not requiring more services from TCEQ and is quite comfortable in continuing to maintain the same fees for the same quality of service.

The current revenue estimates for Account 153 reveal that there are insufficient funds for the agency to continue providing the same level of water program activities in FY 2010 - 2011. General revenue appropriations to the commission have declined from the $51 million received in the 2004 - 2005 biennium. While revenue from existing fees deposited to Account 153 has remained stable, the overall financial obligations of the account have increased. The commission made no change in response to this comment.

Fiscal Note

TML commented that the fiscal note produces an entirely new and outlandish result: no governmental action will ever impose a negative fiscal effect on any other unit of government. For example, TML stated that if the federal government were to place an unfunded mandate on the TCEQ, there would be no fiscal note because the TCEQ would simply increase fees, as it is now doing. Further, TML stated that if Congress were to place an unfunded mandate on the Texas Legislature, there would be no fiscal note because the legislature would simply raise taxes or fees paid by Texans.

The fiscal notes to the proposed rule published in the March 13, 2009, issue of the *Texas Register* stated that local governments would not see significant fiscal impacts. The commission assumed that municipal utilities would pass the cost of the increase along to its customers. The increase is not projected to significantly impact a utility's customers because such costs are not anticipated to be significant and are typically spread across a 12-month period. The commission made no change in response to this comment.

TML commented that the purpose of a fiscal note is to quantify the amount of revenue that an affected unit (or units) of government would be forced to generate as the result of a proposed action. TML stated that the fiscal note in question clearly and utterly fails to do so.

The fiscal note to the proposed rule provided information on fee ranges for local government to allow them to determine their potential expenses. The fiscal note also provided local government information on estimated cost and percentages of increase along with the average increase for systems of different sizes. Additionally, the fiscal note contained similar information for businesses. Since there are approximately 10,000 fee payers affected by this rule, it is not feasible to list for each entity the specific impacts of the proposed fee rate changes. For specific information, the commission encourages fee payers to contact the commission to discuss their particular fee assessment. Fee payers can find contact information at the agency's water fees Web page at *http://www.tceq.state.tx.us/agency/waterfees.html*. The commission made no change in response to this comment.

§21.3, Fee Assessment

AECT commented that at a time when businesses are under significant economic pressure and uncertainty, they believe that the TCEQ's development of proposed rules to increase water fees under §21.3 needs to involve serious consideration of possible ways to reduce the increases in the water fees that will be imposed under §21.3.

Over the last several years, the agency has reviewed its water program activities and has generated savings through streamlined processes, enhanced use of technology that provides efficiencies, and program reviews to ensure that funds are used as efficiently as possible. For example, the commission has continually moved toward electronic processes including electronic permitting, eDMR, and automated internal processes. Though the agency will continue to develop more effective and efficient processes, without the additional funds, it will be required to cut program activities. This could affect permit time lines, the number of TMDLs conducted, the ability to have access to the most current data when making decisions regarding impaired water bodies and how to address those impairments, and the number of investigations.

The commission reviewed all of the agency's water fees in order to determine how to meet its financial obligations for water-related activities beginning in FY 2010. The commission selected the fees that generate sufficient revenue, represent a broad spectrum of fee payers, and provide a relatively stable stream of revenue as opposed to one that fluctuates. These fees included the CWQ fee, the WUF, and the PHS fee. The commission made no change in response to this comment.

Luminant is concerned about what it considers significant and random increases proposed for the fee categories; particularly in light of the proposed increase of the multiplier found in §21.3(b)(7). Luminant commented that either separately, or especially in combination, the proposed increases to the fees and/or the multiplier will result in a significant increase in the cost of producing electricity. Luminant commented that the multiplier found in §21.3(b)(7) is unnecessary and only serves to disguise the true cost of the fees. Luminant commented that the additional proposed 1.75% increase applied by the multiplier, when combined with the proposed increase of each category, actually results in an increase in the annual wastewater fees to Luminant of 223%. Luminant commented that by any standard, this is excessive.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a $30 million shortfall, no change from the $75,000 cap, and that the agency would receive no general revenue.

The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund. The commission made no change in response to this comment.

AECT commented that in §21.3(b)(7) the commission is proposing to raise the multiplier from 1.0 up to 1.75. AECT commented that a potential 75% increase in total fee could significantly increase the fee. AECT stated that the proposed rule provides that the multiplier would be applied each FY and might change annually. AECT commented that this would introduce a level of uncertainty that businesses would find onerous for the planning of their budgets and operations. This multiplier variability calls for some phase-in or limits on annual increases in the multiplier, irrespective of the proposed fee rate increases.

The commission acknowledges that the fee increases are significant but these increases are required at this time. The agency has tried to spread the impact of the fee increase across a broad segment of regulated entities so as not to unduly impact any one sector. The multiplier is necessary to enable the commission to adjust revenue levels based on appropriation levels and Account 153 revenue. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY.

The proposal rates were based on the agency's projected worst case scenario that projected a $30 million shortfall, no change from the $75,000 cap, and that the agency would receive no general revenue. The amount of general revenue in the Appropriations Act to support TCEQ's existing water program activities for the 2010 - 2011 biennium is equivalent to the amount appropriated in the previous biennium. Under the Appropriations Act, the agency will be able to allocate to its water program the same amount of general revenue as in the previous biennium, $9.4 million per year. This revenue will help the agency meet the shortfall in funding for its existing water programs. However, because the amount of general revenue provided to the agency has decreased over historical amounts and the agency's water program fund balance is nearly depleted, the agency had to increase water fees in order to meet its obligations under the fund.

The commission values the need for prior planning. Significant portions of the budget planning process are out of the agency's direct control. The agency's budget is determined biennially by the legislature including how much the agency is authorized to spend and how much general revenue or fee revenue the agency will receive.

The agency does not have an adequate fund balance in Account 153 to implement a phased-in approach for the new fee rates including the multiplier. The commission made no change in response to this comment.

TCC commented that the proposed rule language allows for a 1.75 multiplier; however, the rule language itself does not reference what constitutes a baseline for the 1.75 multiplier. TCC also commented that the proposed rule language specifies up to a maximum rate for the various specific billing attributes, as well as referencing the statute for a maximum fee. TCC stated that the 1.75 multiplier text in the proposed rule is confusing and contradictory and recommended that it should be eliminated.

Under the previous rule the multiplier was set at 1.0 which was the baseline. Under this rule, the baseline is still 1.0 but the rule allows the commission to apply a multiplier up to 1.75. The multiplier will apply to the total amount after the new fee assessments have been calculated under the new rates. The agency anticipates adjusting the multiplier only as necessary to meet an increase in obligations against Account 153. As part of the annual operating budget approval process, the executive director must report to the commission the multiplier that will be applied for the upcoming FY. The commission made no change in response to this comment.

AECT stated that most electric generation companies have made substantial investments to secure water rights in advance of the time when they will actually need the water in order to ensure that adequate water will be available for future electric generating units and for existing electric generating units during droughts. AECT commented that increasing the §21.3(c) water fees will have a negative, possibly significant, impact on the electric generation industry.

The commission acknowledges that electric generation utilities have a substantial investment in securing water rights, however, the fee rate in this rule will treat all water right holders, large or small, the same depending on type of use. While the tiered fee structure for higher volume water usage was eliminated, the fee for water rights for hydropower purposes was reduced under this rulemaking. The agency has tried to spread the impact of the fee increase across a broad segment of fee payers so as not to unduly impact any one sector. The commission made no change in response to this comment.

§290.51, Fees for Services to Drinking Water System

Bethesda WSC is against the proposed TCEQ increase for PHS fees. Currently water utilities are burdened with additional water chemical sampling costs and other mandated programs. Given the extremity of this statute the TCEQ should allow "regulatory fees" assessments as a line item on customer billing.

The commission acknowledges that it is a difficult time for fee payers to face a fee increase given the current economic situation in addition to other increases in expenses they may be facing. However, without additional revenue from this fee increase, the agency would not be able to continue its same level of water program activities. Federal and state laws to which the commission is subject require that the commission carry out specific tasks to protect the state's water resources. These water-related activities benefit people across the state. All Texans benefit from clean and adequate water supplies. To undertake those tasks the commission needs to ensure that funds exist to pay for what it is required to do.

Whether the commission is exercising its original jurisdiction over an IOU or its appellate jurisdiction over a water supply corporation the commission has rules that govern what can be charged in the utility's rate and what can be listed on the utility bill. Section 291.76(b) requires a utility service provider which provides potable water or sewer utility service to collect a regulatory assessment from each retail customer and remit the fee to the commission. Section 291.76(g) allows a utility service provider to include the assessment as separate line item on a customer's bill or include it in the retail charge. Section 291.31 allows a utility to charge reasonable and necessary expenses to rendering service to rate payers. The commenter mentions sampling costs as an expense for the utility. Section 291.21(k)(2)(A) allows the utility to collect a surcharge for sampling fees not already included in the utility's rate. The commission made no change in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; §5.013, which establishes the commission's authority over various statutory programs, including water programs; §5.102, concerning general powers of the commission; §5.103 and §5.105, which establish the commission's general authority to adopt rules; §5.701, which provides statutory direction regarding the uses of fees collected for deposit to the water resource management account; Texas Health and Safety Code (THSC), §341.0315, which establishes the commission's authority over public drinking water supply systems; and THSC, §341.041, which authorizes the commission to assess fees for public drinking water supply systems.

The adopted amendment implements THSC, §341.0315 and §341.041.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 10, 2009.

TRD-200902832

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Effective date: July 30, 2009

Proposal publication date: March 13, 2009

For further information, please call: (512) 239-6087

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, RELEASE, AND DISCHARGE

SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.24

The Texas Youth Commission (TYC) adopts new §85.24, concerning Assessment for Safe Housing Placement, without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2888).

The justification for the new rule is to provide for youth and staff safety through the operation of an evidence-based system of assigning youth to appropriate housing placements.

The new rule will establish a system for ensuring that youth are assessed and assigned to the safest possible housing assignment within the youth's current placement. Evidence-based criminogenic factors, physical stature, likelihood of sexual vulnerability or aggression, medical needs, suicide risk, and other individual factors are assessed upon initial admission and periodically throughout a youth's stay in residential facilities. Housing assignments will be made and changed based on the results of these assessments.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Human Resources Code §61.061, which requires the TYC to adopt scheduling, housing, and placement procedures for the purpose of protecting vulnerable children, and prohibits TYC from assigning a child younger than 15 years of age to the same correctional facility dormitory as a person who is at least 17 years of age unless TYC determines that the placement is necessary to ensure the safety of children.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902819

Cheryln K. Townsend

Executive Commissioner

Texas Youth Commission

Effective date: August 1, 2009

Proposal publication date: May 15, 2009

For further information, please call: (512) 424-6014

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CHAPTER 91. PROGRAM SERVICES

SUBCHAPTER D. HEALTH CARE SERVICES

The Texas Youth Commission (TYC) adopts new §§91.75, 91.81, and 91.83, the repeal of §§91.81, 91.83, and 91.85, and amendments to §§91.86, 91.92, and 91.94 of this title.

New §§91.75, 91.81 and 91.83, repealed §§91.81, 91.83, and 91.85, and amended §91.86 and §91.92 are adopted without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3246).

Amended §91.94 is adopted with changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3249). Changes to the proposed text are outlined below, as described in TYC's responses to public comments received.

The justification for the new, amended, and repealed rules is the availability of accurate and current policy information regarding healthcare services provided by TYC.

New §91.75 (relating to definitions) consolidates definitions used throughout the subchapter into one rule.

New §91.81 (relating to medical consent) establishes standards whereby TYC exercises its authority to consent to particular medical services for youth in TYC jurisdiction.

New §91.83 (relating to health services for youth) consolidates information previously contained in other rules and establishes criteria for providing care, the scope of available healthcare services, and standards for the delivery of healthcare services to youth.

The repeal of §§91.81, 91.83, and 91.85 allows for the publication of new §91.81 and §91.83.

Amended §91.86 (relating to infirmary admission and discharge) provides clarification regarding the level of authorization needed to admit or discharge a youth from the infirmary for period of longer than 24 hours, and establishes that an associate psychologist may conduct the required daily evaluation for a youth admitted to the infirmary in a psychiatric emergency when a Ph.D. level psychologist is unavailable.

Amended §91.92 (relating to emergency administration of psychotropic medication) adds that commitment to a state hospital will be initiated if continued involuntary administration of psychotropic medication is necessary, and requires TYC staff to notify the youth's parents/guardian any time a psychotropic medication is administered against a youth's will.

Amended §91.94 (relating to automated external defibrillators) requires each facility to designate certain first responder staff who will be required to participate in hands-on training in the use of automated external defibrillators.

Comments concerning §91.94 were received from MEDIC FIRST AID International and American Safety and Health Institute. The comments are summarized below, along with TYC's response.

Comment: As currently worded, the regulation would limit the training options for TYC staff to courses provided by the American Red Cross. The phrase "or an equivalent nationally recognized organization" should be added to the proposed text to provide more training options and avoid restraint of trade issues.

Response: TYC agrees with the recommendation. Subsection (g)(1) has been amended to include the suggested wording.

37 TAC §§91.75, 91.81, 91.83, 91.86, 91.92, 91.94

The amended and new sections are adopted under the Human Resources Code, §61.076, which provides TYC with the authority to provide any necessary medical or psychiatric treatment to youth committed to its care, as well as Family Code §32.001, which provides TYC with the authority to consent to the medical, dental, psychological, and surgical treatment of a child committed to it when the person having the right to consent has been contacted and that person has not given actual notice to the contrary.

§91.94. Automated External Defibrillators.

(a) Purpose. The purpose of this policy is to establish procedures and guidelines for the operation, storage, maintenance, and training requirements associated with the use of Automated External Defibrillators (AEDs).

(b) Applicability. This rule applies to employees at TYC-operated facilities, designated district offices, and the Central Office/Annex.

(c) Definitions. Definitions pertaining to this rule are under §91.75 of this title.

(d) General Provisions.

(1) The TYC medical director authorizes the acquisition of AEDs for placement at all TYC-operated facilities, designated district offices, and the Central Office/Annex.

(2) Upon acquiring an AED, the chief local administrator or designee shall notify the local emergency medical services (EMS) provider of the existence, location, and type of AED.

(e) Cardiac Chain of Survival. Cardiac chain of survival is the current treatment for sudden cardiac arrest that includes the following four steps:

(1) Call 911 or facility gatehouse/control center and include notification that an AED will be used;

(2) begin Cardiopulmonary Resuscitation (CPR);

(3) provide early defibrillation; and

(4) provide Advanced Cardiac Life Support (to be performed by EMS).

(f) Restrictions for Use.

(1) The AED is to be used only if the person is unresponsive and has no pulse.

(2) The AED is to be used only on persons over the age of eight years old.

(3) The AED will provide voice prompts giving further instructions if it cannot read the cardiac rhythm due to improper electrode placement, motion of the person, low battery, or electromagnetic interference, etc.

(4) The AED voice prompt will not instruct the user to shock the person if the person's cardiac rhythm does not warrant a shock or if the person's cardiac rhythm suddenly changes and shock is no longer indicated.

(5) The AED voice prompts will not advise the user to shock the person if the person is experiencing a myocardial infarction.

(g) AED Training.

(1) A qualified CPR/First Aid/AED TYC trainer or a qualified contracted trainer will provide American Red Cross (or an equivalent nationally recognized organization) CPR/First Aid training and instruction in the use of an AED to all TYC sole supervision staff an-

nually. The facility administrator will designate staff to receive additional hands-on training on the use of AED.

(2) All TYC staff are required to watch the AED training video annually. Training will include the location of the AED and be documented and maintained by the local training officer.

(3) The AED training program is approved by the TYC medical director and the Texas Department of State Health Services in accordance with the Health and Safety Code, Chapter 779.

(h) General Requirements.

(1) The AED shall be readily accessible to staff, but at no time shall an AED be accessible to TYC youth.

(2) Each TYC-operated facility that houses youth, designated TYC district offices, and the Central Office/Annex will have an AED on-site.

(3) The AED should be stored in a protective case at all times. The storage area should be free from water, dirt, extreme cold (less than 32 degrees F), and extreme heat (over 100 degrees F).

(4) The following equipment should be stored with each AED:

(A) carrying case;

(B) scissors;

(C) defibrillation pads (2 sets; each facility/district office will keep on hand an additional set of AED replacement pads);

(D) razor;

(E) towel;

(F) pocket mask; and

(G) latex disposable gloves.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902826
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: August 1, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 424-6014

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37 TAC §§91.81, 91.83, 91.85

The repealed sections are adopted under the Human Resources Code, §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902825
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: August 1, 2009
Proposal publication date: May 22, 2009
For further information, please call: (512) 424-6014

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CHAPTER 93. YOUTH RIGHTS AND REMEDIES

The Texas Youth Commission (TYC) adopts the repeal of §93.33, concerning Alleged Abuse, Neglect, and Exploitation, and new §93.33, concerning Alleged Abuse, Neglect, and Exploitation. The repealed rule and new rule are adopted without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2912).

The justification for the repealed rule is to allow for a new rule to be published in its place. The justification for the new rule is the availability of current information concerning TYC's investigative operations, and compliance with state law.

The new rule will clarify that the standards for investigations described in the rule apply only to administrative investigations of abuse, neglect, or exploitation conducted under the Family Code, Chapter 261, not to criminal investigations conducted under Human Resources Code §61.0451. The new rule will also establish that every allegation of abuse is screened by OIG staff to determine whether a criminal investigation is warranted.

The new rule will also revise the provisions regarding the release of reports of alleged abuse, neglect, or exploitation to the public. In compliance with changes to Family Code §261.201, the rule will establish that TYC will release reports of alleged abuse or neglect when it is not prohibited from doing so by Government Code Chapter 552 or other law. The new rule also establishes standards for redaction of information when reports of abuse or neglect are publicly disclosed.

No comments were received regarding adoption of the new rule.

37 TAC §93.33

The repeal is adopted under Human Resources Code, §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902820
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: August 1, 2009
Proposal publication date: May 15, 2009
For further information, please call: (512) 424-6014

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37 TAC §93.33

The new section is adopted under Family Code, §261.201, which requires TYC to release a report of alleged or suspected abuse

or neglect if it is not prohibited by Chapter 552, Government Code, or other law from disclosing the report, and to edit the report to protect the identity of certain persons. The section is also proposed under the Human Resources Code, §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 9, 2009.

TRD-200902821
Cheryln K. Townsend
Executive Commissioner
Texas Youth Commission
Effective date: August 1, 2009
Proposal publication date: May 15, 2009
For further information, please call: (512) 424-6014

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

On-Site Wastewater Treatment Research Council

Title 31, Part 9

The Texas On-Site Wastewater Treatment Research Council (council) adopts the rules review and readopts 31 TAC Chapter 286, On-Site Wastewater Treatment Research Council, without changes, in accordance with the requirements of Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the April 3, 2009, issue of the *Texas Register* (34 TexReg 2243).

CHAPTER SUMMARY

Chapter 286 provides for the organization, administration, and general procedures and policies concerning the council's operation. The rules define the organization and administration of the council. The primary purpose of the council is to award competitive grants to enhance the development of on-site wastewater treatment systems through applied research, demonstration projects, and technology transfer. These rules provide the procedures for submission of grant applications and establish criteria for eligibility of grant applications and for the selection of grant awards. The rules also provide the procedures for accepting grants and donations to the council.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The council conducted a review and determined that the reasons for the rules in Chapter 286 continue to exist. The rules are necessary to implement the requirements in Health and Safety Code, Chapter 367, and for the operation of the council. The rules define the council's grant review and awarding process. Therefore, the rules are necessary to carry out the functions and duties of the council.

PUBLIC COMMENT

The public comment period closed on May 4, 2009. No comments were received.

STATUTORY AUTHORITY

The rules are re-adopted under Health and Safety Code, §367.008, which authorizes the council to establish procedures for awarding competitive grants and disbursing grant money. The council interprets that section as authorizing it to re-adopt these rules because the procedures the council is statutorily authorized to adopt meet the definition of a "rule" under the Administrative Procedure Act, Government Code, Chapter 2001.

The council hereby certifies that the sections as re-adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

TRD-200902870
Janet Meyers
Chairman
On-Site Wastewater Treatment Research Council
Filed: July 14, 2009

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Texas Board of Professional Land Surveying

Title 22, Part 29

The Texas Board of Professional Land Surveying (TBPLS) adopts the review of Texas Administrative Code, Title 22, Part 29, Chapter 661 concerning General Rules of Procedures and Practices, Chapter 663 concerning Standards of Responsibility and Rules of Conduct, Chapter 664 concerning Continuing Education and Chapter 665 concerning Examination Advisory Committee as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 10069).

The agency's reason for adopting the rules contained in these chapters continues to exist.

No comments were received regarding adoption of the rule review.

This concludes the review of Chapter 661 - General Rules of Procedures and Practices, Chapter 663 - Standards of Responsibility and Rules of Conduct, Chapter 664 - Continuing Education and Chapter 665 - Examination Advisory Committee.

TRD-200902845
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Filed: July 13, 2009

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IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of July 3, 2009, through July 9, 2009. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on July 15, 2009. The public comment period for this project will close at 5:00 p.m. on August 14, 2009.

FEDERAL AGENCY ACTIONS:

Applicant: Texas Gulf and Harbor, Ltd.; Location: The project is located in wetlands and uplands adjacent to Corpus Christi Bay, two miles south of Port Aransas, in Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Aransas, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 687358; Northing: 3076258. Project Description: The proposed project consists of the construction of a 323-lot residential canal development that includes a marina and access channels that will connect to the Isla Mooring development to the north and the proposed Newport Marina development to the south. The project is situated on an approximate 533-acre tract of land that contains approximately 282 acres of wetlands. The proposed construction will result in the filling of 1.12 acres of jurisdictional wetlands, the excavation of 15.1 acres of wetlands, and the excavation of 98.1 acres of uplands for canal and basins. As mitigation the applicant proposes the onsite construction of 37.8 acres of wetlands and the preservation of 172.3 acres of onsite wetlands. This project was previously noticed on 3 August 2005 under DA permit application 23764 with a similar development design, but with more wetland impacts. That application was withdrawn at the applicant's request. CCC Project No.: 09-0197-F1. Type of Application: U.S.A.C.E. permit application #SWG-2005-00522 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Spoonbill Bay Development, LP; Location: The project is located adjacent to West Bay, on a 115.10-acre tract, north of FM 3005 and about 2.8 miles east of San Luis Pass, near the Bay Harbor Subdivision, on the west end of Galveston Island, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: San Luis Pass, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 297169; Northing: 3223317. Project Description: The applicant proposes to place fill into 2.54 acres of freshwater wetlands and 0.09 acre of tidal wetlands and 9.67 acres of open water, mechanically excavate 0.38 acre of fresh water wetlands, 0.08 acre of tidal wetlands and 6.54 acres of uplands and hydraulically dredge 5.77 acres of shallow open water bay bottom during the construction of 7,688 linear feet of circulating canal system, 5,630 linear feet of bulkheading, waterfront residential housing lots and associated infrastructure. The applicant also proposes to fill 9.67 acre of shallow non-vegetated open water associated with the construction of a beneficial use shoreline preservation/creation area. The Spoonbill Bay development proposes to avoid onsite 5.60 acres of freshwater wetlands, 13.67 acres of tidal wetlands, 3.53 acres of sand flats, and 34.68 acres of uplands. To compensate for unavoidable impacts to jurisdictional areas, the applicant proposes to create a 32.58-acre Beneficial Use (BU) of Dredge Material Shoreline Preservation and Marsh Creation Area. The BU site includes 0.66 acre of geotubes, 6.0 acres of marsh mounds with planted creation area and 3.01 acres of creation area along the circulation and entrance portions of the canal system. The applicant also proposes to establish a conservation easement to permanently protect the avoided 60.05 acres of wetlands, sandflats and uplands on both the northern and southern ends of the property from future development. The conservation easement is broken down into 5.60 acres of freshwater wetlands, 13.67 acres of estuarine wetlands, 3.53 acres of sand flats, 34.68 acres of uplands and a 2.57 acre freshwater wetland creation area. CCC Project No.: 09-0199-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-01475 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Hal Jones Development, LLC; Location: The project is located on a 121-acre tract of land contiguous with Aransas Bay, southwest of the intersection of Park Road 13 and East Main Street, Lamar Subdivision, approximately 10 miles north of Rockport, in Aransas County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: St. Charles Bay, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 698728; Northing: 3113191. Project Description: The applicant proposes to construct a 188-lot canal subdivision with boat access to the adjacent bays and the Gulf Intracoastal Canal. Approximately 540,000 cubic yards of soil would be excavated above the Annual High Tide line (AHT) to build the canals. Material would be placed onsite and used as fill and grading material for the development. Excavation would be accomplished by mechanical means working from land and Best Management Practices would be used to control sediment runoff from the excavation site. Approximately 8,455 square feet of smooth cordgrass wetlands, 4,922.7 square feet of seagrass, 171,812.8 square feet of upper saltmarsh wetlands and 302,746.5 square feet of upper palustrine wetlands would be filled by this project. Approximately 275,486 square feet of unvegetated bay bottom would be excavated below the AHT and approximately 22,608.9 square feet of unvegetated area below the AHT would be filled. Preservation of 9 acres of estuarine wetlands located onsite and an In-Lieu-Fee proposal are offered as mitigation for unavoidable impacts to waters of the United States. CCC Project

No.: 09-0200-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-00038 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Cameron County Regional Mobility Authority; Location: The project is located along a 3.01-mile right-of-way (ROW) that extends from the existing State Highway (SH) 550 roadway east of FM 3248 to the proposed intersection with SH 48 on the northeast side of Brownsville, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: East Brownsville, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 659150; Northing: 2873300. Project Description: The applicant proposes to fill 16.658 acres of waters of the U.S., including 13.375 acres of wetlands, for the proposed SH 550 spur. The ROW for this project would cross one jurisdictional water of the U.S. (Rancho Viejo Floodway), and five jurisdictional wetlands. As mitigation for project impacts, the applicant proposes to enter into an agreement with the Port of Brownsville, which would either assign credits from the mitigation bank it is in the process of developing, or grant a conservation easement to the applicant guarantying the preservation of specified wetlands at a minimum 1:1 ratio to impacts. CCC Project No.: 09-0204-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00258 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Port of Houston Authority (PHA); Location: The project is located adjacent to the Bayport Ship Channel and in Galveston Bay, approximately 30 miles southeast of downtown Houston, in the City of Pasadena, Harris County, Texas. The project can be located on the U.S.G.S. quadrangle maps entitled "League City, Texas" and "Bacliff, Texas". Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 305000; Northing: 3277000. Project Description: The PHA has requested an extension of time and amendment to an existing permit for the development of a container/cruise ship terminal. The applicant proposes to extend the term of the existing permit, remove requirement to use turbidity curtains, remove requirements to monitor fugitive dust, amend project plans to consolidate the terminal pre-entry gate and the main entry gate, at the currently permitted main entry gate location between the sight and sound barrier berm and a portion of the container yard, and to add Dredge Material Placement Areas and Beneficial Use areas where new work and/or maintenance-dredged material from the Bayport project could be placed by hydraulic pipeline and/or mechanical means. CCC Project No.: 09-0207-F1. Type of Application: U.S.A.C.E. permit application #SWG-1998-01818 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Sabine Neches Navigation District; Location: The proposed project is located within the previously authorized and built federal project, the Taylor Bayou Outfall Canal seven-gate saltwater barrier. The saltwater barrier/flood control structure is located at the intersection of the Taylor Bayou Outfall Canal and Taylor Bayou, in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Big Hill Bayou, Texas. Approximate UTM Coordinates in NAD 28 (meters): Zone 15; Easting: 402275; Northing: 3303552. Project Description: The applicant proposes to expand an existing seven-gate saltwater barrier/flood control structure by constructing four additional gates. CCC Project No.: 09-0209-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00756 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200902885
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: July 15, 2009

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Comptroller of Public Accounts

Notice of Contract Amendment

The Texas Treasury Safekeeping Trust Company (Trust Company) announces the amendment and renewal of the certified public accountant services contract with Padgett Stratemann & Co., LLP, 515 Congress Avenue, Suite 1212, Austin, Texas 78701, for an additional one (1) year term. The contractor provides certified public accounting services to conduct audits of the Trust Company and certain Trust Company managed funds.

The term of the original contract was July 24, 2008, through May 31, 2009. The amended term of the contract is June 1, 2009, through August 31, 2010. The Trust Company shall have the right to renew the contract for one (1) additional one (1) year term.

The total amount of the contract is not to exceed $200,000.00.

The notice of request for proposals (RFP #184b) was published in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3458). The notice of award was published in the August 8, 2008, issue of *Texas Register* (33 TexReg 6432).

TRD-200902861
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 13, 2009

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Notice of Request for Proposals

Pursuant to Chapters 403; 2305, §2305.037; and 791, Texas Government Code, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO) announces its Request for Proposals (RFP #194d) and invites proposals from qualified, interested independent school districts (ISD) and campuses to create and install an innovative renewable energy demonstration project and provide educational and related services to support the project. The Comptroller reserves the right to award more than one contract under the RFP. If a contract award is made under the terms of this RFP, Contractor will be

expected to begin performance of the contract on or about September 1, 2009, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 E. 17th St., Room 201, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on Friday, July 24, 2009, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, July 24, 2009.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. CZT on Friday, July 31, 2009. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. On or about Friday, August 7, 2009, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Respondents shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. CZT, on Friday, August 14, 2009. Late Proposals will not be considered under any circumstances. Respondents shall be solely responsible for verifying time receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - July 24, 2009, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - July 31, 2009, 2:00 p.m. CZT; Official Responses to Questions Posted - August 7, 2009; Proposals Due - August 14, 2009, 2:00 p.m. CZT; Contract Execution - September 1, 2009, or as soon thereafter as practical; Commencement of Services - September 1, 2009.

TRD-200902884
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 15, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/20/09 - 07/26/09 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/20/09 - 07/26/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment, or other similar purpose.

TRD-200902868
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 14, 2009

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 24, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 24, 2009.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Aztec Cove Property Owners Association, Inc.; DOCKET NUMBER: 2009-0595-MWD-E; IDENTIFIER: RN101519189; LOCATION: Trinity County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0011831001, Effluent Limitations and Monitoring Requirements Number 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total residual chlorine; PENALTY: $2,740; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: BASF Corporation; DOCKET NUMBER: 2009-0525-AIR-E; IDENTIFIER: RN100225689; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(1), 116.115(c), and 117.310(c)(1), 40 Code of Federal Regulations (CFR) §60.612(a), Permit Number 8084A, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the permitted emission rates for nitrogen oxides (NO_x), carbon monoxide, and volatile organic compounds (VOCs); PENALTY: $13,300; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: City of Blanco; DOCKET NUMBER: 2009-0655-PWS-E; IDENTIFIER: RN101389047; LOCATION: Blanco, Blanco County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level (MCL) for total trihalomethanes (TTHM); PENALTY: $397; ENFORCEMENT COORDINATOR: Chris Keffer, (512) 239-5610; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(4) COMPANY: Ricky G. Bockmon; DOCKET NUMBER: 2009-0957-WOC-E; IDENTIFIER: RN104466610; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(5) COMPANY: Cory L. Bryant; DOCKET NUMBER: 2009-0960-WOC-E; IDENTIFIER: RN103220026; LOCATION: Brady, McCulloch County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(6) COMPANY: Center Convenience, Inc. dba Almeda Food Mart; DOCKET NUMBER: 2009-0736-PST-E; IDENTIFIER: RN102238565; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $3,596; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Chevron Phillips Chemical Company, L.P.; DOCKET NUMBER: 2009-0389-AIR-E; IDENTIFIER: RN100209857; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 21101, SC Number 8, and THSC, §382.085(b), by failing to comply with permitted emission limits; PENALTY: $7,450; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(8) COMPANY: Chevron Phillips Chemical Company, L.P.; DOCKET NUMBER: 2009-0396-AIR-E; IDENTIFIER: RN102320850; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), NSR Permit Number 7719A, SC Number 1, Federal Operating Permit (FOP) Number O-02165, Special Terms and Conditions Number 1, and THSC, §382.085(b), by failing to maintain the emissions limit within the maximum allowable emission rate table; PENALTY: $25,000; Supplemental Environmental Project (SEP) offset amount of $10,000 applied to Texas Parent Teacher Association - *Clean School Bus Program;* ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Chevron Phillips Chemical Company, L.P.; DOCKET NUMBER: 2009-0489-AIR-E; IDENTIFIER: RN100209857; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 18568, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.211(b) and THSC, §382.085(b), by failing to properly report Incident Number 105342; PENALTY: $8,034; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(10) COMPANY: Citgo Refining and Chemicals Company, L.P.; DOCKET NUMBER: 2009-0340-AIR-E; IDENTIFIER: RN100238799; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 8778A and PSD-TX-408M3, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b)(1)(G) and (H) and THSC, §382.085(b), by failing to report all the emissions released during Incident Number 106027; PENALTY: $7,700; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(11) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2009-0301-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.715(c), Air Permit Number 5290A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2009-0285-AIR-E; IDENTIFIER: RN100542711; LOCATION: Orange, Orange County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), Air Permit Numbers 914 and 9176, SC Number 1, FOP Numbers O-02074 and O-02001, General Terms and Conditions and SC Numbers 8 and 15, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(a)(1) and §122.143(4), FOP Number O-02001, SC Number 2F, and THSC, §382.085(b), by failing to submit an initial report within 24 hours for Incident Number 116375; PENALTY: $14,178; SEP offset amount of $5,671 applied to Jefferson County: Retrofit/Replacement of Heavy Equipment and Vehicles with Alternative Fueled Equipment and Vehicles; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1452, (409) 898-3838.

(13) COMPANY: Formosa Plastics Corporation, Texas; DOCKET NUMBER: 2009-0216-AIR-E; IDENTIFIER: RN100218973; LOCATION: Point Comfort, Calhoun County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), Air Permit Number 7699 and PSD-TX-226M6, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions and by failing to comply with the 0.98 pounds per hour particulate matter emissions limit; 30 TAC §101.20(3), 40 CFR §61.67(a), and THSC, §382.085(b), by failing to conduct an initial performance test; 30 TAC §101.20(3) and §116.115(c), Air Permit Number 19168, SC Number 1, and THSC, §382.085(b), by failing

to prevent unauthorized emissions during Incident Numbers 117332 and 117340; PENALTY: $62,555; SEP offset amount of $25,022 applied to City of Point Comfort-Wastewater Treatment Plant Repair Assistance; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(14) COMPANY: Inverness Forest Improvement District; DOCKET NUMBER: 2009-0538-MWD-E; IDENTIFIER: RN103786737; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010783001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for NO_x; PENALTY: $4,050; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Lake Ridge Water System, L.P. dba Lake Ridge Properties, Inc.; DOCKET NUMBER: 2007-1944-PWS-E; IDENTIFIER: RN101266948; LOCATION: Del Rio, Val Verde County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to provide a boil water notice; and 30 TAC §290.46(d)(2)(A) and THSC, §341.0315(c), by failing to maintain a free chlorine residual of 0.2 milligram per liter throughout the distribution system; PENALTY: $374; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(16) COMPANY: LITTLE STAR, INC. dba T & T Food Mart; DOCKET NUMBER: 2009-0707-PST-E; IDENTIFIER: RN100884360; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $3,096; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Juan Michel; DOCKET NUMBER: 2009-0950-WOC-E; IDENTIFIER: RN103743530; LOCATION: El Paso County; TYPE OF FACILITY: water licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(18) COMPANY: Millicrete Ready-Mix, L.P.; DOCKET NUMBER: 2009-0447-AIR-E; IDENTIFIER: RN104744016; LOCATION: Cleveland, Liberty County; TYPE OF FACILITY: concrete batch plant; RULE VIOLATED: 30 TAC §116.115(c) and §116.615(8), Standard Permit Number 76546, SC Number 1(F), and THSC, §382.085(b), by failing to maintain records of production rates for each hour of operation for the most recent rolling 24-month period; 30 TAC §116.115(c) and §116.615(9), Standard Permit Number 76546, SC Number 3(B)(i) and (iii), and THSC, §382.085(b), by failing to connect the suction shroud to the fabric or cartridge filter system during operation, resulting in the failure to meet the performance standard of no visible emissions exceeding 30 seconds in a six-minute period; 30 TAC §116.115(c), Standard Permit Number 76546, SC Number 3(E) and (F), and THSC, §382.085(b), by failing to minimize dust emissions from all roads, traffic areas, and stockpiles; and 30 TAC §116.115(c), Standard Permit Number 76546, SC Number 6(D)(iii) and (E)(ii), and THSC, §382.085(b), by failing to store stockpiles which are not in a bunker at least 25 feet from the property line or within a three-walled bunker which extends at least two feet above the top of the stockpile; PENALTY: $3,588; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: Reynolds & Kay, Limited; DOCKET NUMBER: 2009-0161-WQ-E; IDENTIFIER: RN105396527; LOCATION: Tyler, Smith County; TYPE OF FACILITY: highway construction site; RULE VIOLATED: 30 TAC §305.125(1), TPDES Construction General Permit (CGP) Number TXR15IZ34, Part III, Sections F(6)(a) and (d), and the Code, §26.121(a), by failing to design and maintain erosion and sediment controls in effective operating condition and to remove sediment accumulations that escape the site at a frequency that minimizes off-site impacts, resulting in an unauthorized discharge; 30 TAC §305.125(1) and TPDES CGP Number TXR15IZ24, Part III, Section F(2)(a)(iii), by failing to remove sediment from sediment controls before the design capacity has been reduced by 50%; and 30 TAC §305.125(1) and TPDES CGP Number TXR15IZ24, Part III, Section F(5)(a), by failing to minimize vehicles from tracking sediment off-site; PENALTY: $26,450; SEP offset amount of $13,225 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Rohm and Haas Texas Incorporated; DOCKET NUMBER: 2009-0296-AIR-E; IDENTIFIER: RN100223205; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 48921, SC Number 1, FOP Number O-02232, SC Number 15, and THSC, §382.085(b), by failing to comply with the 48.8 tons per year VOC; PENALTY: $59,700; SEP offset amount of $23,880 applied to Houston Regional Monitoring Corporation - Houston Area Monitoring; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(21) COMPANY: Sabine River Authority of Texas; DOCKET NUMBER: 2009-0469-MWD-E; IDENTIFIER: RN101528420; LOCATION: Orangefield, Orange County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012134001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for total suspended solids; 30 TAC §305.125(17) and TPDES Permit Number WQ0012134001, Sludge Provisions, by failing to timely submit the annual sludge report; and 30 TAC §305.125(17) and TPDES Permit Number WQ0012134001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monthly discharge monitoring reports; PENALTY: $1,514; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(22) COMPANY: Sooners Group, L.P.; DOCKET NUMBER: 2009-0321-WQ-E; IDENTIFIER: RN105577852; LOCATION: Wylie, Collin County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), TPDES CGP, and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: City of Strawn; DOCKET NUMBER: 2008-1652-PWS-E; IDENTIFIER: RN101424968; LOCATION: Strawn, Palo Pinto County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to comply with the MCL for haloacetic acids; and 30 TAC §290.113(f)(4) and

THSC, §341.0315(c), by failing to comply with the MCL for TTHM; PENALTY: $810; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: TMT, INC. dba Whip in 112; DOCKET NUMBER: 2009-0436-PST-E; IDENTIFIER: RN102406337; LOCATION: Sunnyvale, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: $4,071; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2009-0448-AIR-E; IDENTIFIER: RN100238385; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a), Air Permit Number 39142, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; SEP offset amount of $5,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200902869
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 14, 2009

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Notice of District Petition

Notice issued July 8, 2009.

TCEQ Internal Control No. 02202009-D02; Manvel Town Center, Ltd., Manvel North 40 Acres, Ltd., Manvel South 32 Acres, Ltd., Hemisphere Holdings, Inc., and JAA Investments, LLC, and Jerry A. Argovitz (collectively, the "Petitioner") filed a petition for creation of Brazoria County Municipal Utility District No. 42 (the "District") with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition was filed with the county clerk in Brazoria County, pursuant to 30 TAC Section (§) 293.11(d). The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) the proposed District will contain approximately 191.732 acres located in Brazoria County, Texas; and (3) the proposed District is within the corporate boundaries and extraterritorial jurisdiction of the City of Manvel, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The petition indicates that there are five lienholders, Manvel 6.448 J.V., South Six 8.005 J.V., Arcola 13.435 J.V., Manvel 4.2 J.V., and Bank of the Ozarks, on the property to be included in the proposed District. The Petitioner has provided the TCEQ with certificates evidencing the lien holder's consent to the creation of the proposed District. By Resolution No. 2009-R-1, effective January 26, 2009, the City of Manvel, Texas, gave its consent to the creation of the proposed District, pursuant to Texas Water Code §54.016. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $22,250,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200902890
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 15, 2009

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 24, 2009.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders

and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 24, 2009.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: CITGO Refining and Chemicals Company, L.P.; DOCKET NUMBER: 2008-0273-IHW-E; TCEQ ID NUMBER: RN102555166; LOCATION: 1801 Nueces Bay Boulevard, Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.6, by failing to comply with notification requirements; 30 TAC §335.10(b) and (d)(1), and 40 Code of Federal Regulations (CFR) §262.20(a) and §262.23(a), by failing to comply with manifesting requirements; 30 TAC §335.69(a)(1)(A) and §335.112(a)(8), and 40 CFR §262.34(a)(1)(i) and §265.171, by failing to maintain a container storing hazardous waste in good condition; and 30 TAC §335.69(a)(1)(A) and §335.112(a)(8) and 40 CFR §262.34(a)(1)(i) and §265.173(b), by failing to properly manage a hazardous waste container; and 40 CFR §265.15(d), by failing to maintain weekly inspections at areas where containers are stored; PENALTY: $23,460; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(2) COMPANY: City of Elsa; DOCKET NUMBER: 2008-0915-PWS-E; TCEQ ID NUMBER: RN101219665; LOCATION: 500 West Fifth Street, Elsa, Hidalgo County; TYPE OF FACILITY: public water supply system; RULES VIOLATED: 30 TAC §290.110(e)(2) and (5) and §290.111(h)(3) and (11), by failing to submit surface water monthly operating reports by the tenth day of the month following the end of the reporting period; PENALTY: $10,782; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: The City of Roma; DOCKET NUMBER: 2008-0493-MSW-E; TCEQ ID NUMBER: RN102289873; LOCATION: one mile north of the intersection of Roma Landfill Road and Farm-to-Market (FM) Road 650, Roma, Starr County; TYPE OF FACILITY: municipal solid waste landfill; RULES VIOLATED: 30 TAC §330.121(a) and TCEQ Docket Number 2003-0291-MLM-E, Ordering Provision Number 3.b.iv., by failing to follow permit and incorporated plans or other related documents associated with the permit, and by failing to comply with an ordering provision for Docket Number 2003-0291-MLM-E; 30 TAC §330.121(a) and §330.125(a) and Site Operating Plan, Part IV, Section 2, by failing to maintain all site records at the facility, including the site operating plan; 30 TAC §330.121(a), Site Operating Plan, Part IV, Section 5.c, and TCEQ Docket Number 2003-0291-MLM-E, Ordering Provision Number 3.b.ii, by failing to provide training for appropriate facility personnel and by failing to comply with an ordering provision for Docket Number 2003-0291-MLM-E; 30 TAC §330.165(a), by failing to apply at least six inches of daily cover, and 30 TAC §21.4 and TWC, §5.702, by failing to pay Consolidated Water Quality late fees for TCEQ financial account number 23005018; PENALTY: $27,950; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(4) COMPANY: Derek Broussard dba Broussard Auto Parts & Repair; DOCKET NUMBER: 2007-0102-MLM-E; TCEQ ID NUMBER: RN100691674; LOCATION: 99 Green Avenue, Orange, Orange County; TYPE OF FACILITY: inactive auto repair station; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration to the TCEQ for any change or additional information regarding underground storage tanks (USTs) within 30 days of the date on which the owner or operator first became aware of the change or addition; 30 TAC §324.6 and 40 CFR §279.22(b) and (d), by failing to ensure that containers and aboveground tanks used to store used oil at the facility are in good condition (no severe rusting, apparent structural defects or deterioration), and not leaking; and by failing to upon detection of a release of used oil to the environment, stop the release, contain the release, properly clean-up and manage the release, and if necessary, repair/replace any leaking used oil storage containers prior to returning them to service; and 30 TAC §324.6 and 40 CFR §279.22(c)(1), by failing to properly label or mark used oil containers with the words "Used Oil"; PENALTY: $3,150; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Devon Development Corporation; DOCKET NUMBER: 2008-1018-WQ-E; TCEQ ID NUMBER: RN105232490; LOCATION: Lake Hill Estates, located west of Lake Weatherford between Westlake Drive and Stage Coach Trail, Weatherford, Parker County; TYPE OF FACILITY: single-family residential construction site; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities to waters in the State and to develop and implement a storm water pollution plan (SWP3); PENALTY: $1,050; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Double Diamond Utilities Company; DOCKET NUMBER: 2008-0036-MLM-E; TCEQ ID NUMBER: RN102328515, RN102329802, and RN101265213; LOCATION: Adjacent to Possum Kingdom Lake immediately west of State Highway 16 and south of the Brazos River, Palo Pinto County (Facility 1); 2.5 miles northwest of the intersection of FM Road 933 and FM Road 2604, Hill County (Facility 2); and 160 Cliffs Drive, Graford, Palo Pinto County (Water System); TYPE OF FACILITY: wastewater treatment facilities (Facilities 1 and 2) and public water system (Water System); RULES VIOLATED: 30 TAC §290.46(e)(6)(A) and THSC, §341.033(a), by failing to employ at least one operator who holds a Class "B" or higher surface water license; 30 TAC §290.46(f)(3)(D)(ii), by failing to maintain records of the inspection results for all water storage and pressure maintenance facilities at the Water System; 30 TAC §290.43(c)(1), by failing to provide an adequate roof vent on clearwell tank number 2; 30 TAC §290.43(c)(2), by failing to provide a locked roof hatch on clearwell tank number 1; TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0002789000, Effluent Limitations and Monitoring Requirements Number 1 for Outfalls 001 and Numbers 1 and 2 for Outfall 201, by failing to comply with the permitted effluent limits for Facility 1; 30 TAC §305.125(17) and TPDES Permit Number WQ0002789000,

Monitoring and Reporting Requirements Number 1, by failing to submit discharge monitoring reports (DMRs) and DMR parameter data for Facility 1; 30 TAC §305.125(17) and TPDES Permit Number WQ0002789000, Monitoring and Reporting Requirements Number 1, by filing to submit DMR parameter data for Facility 1; 30 TAC §305.125(17) and TPDES Permit Number WQ0002789000, Monitoring and Reporting Requirements Number 1, by failing to submit DMR parameter data for Facility 1; TWC, §26.121(a), 30 TAC §305.125(1), and TPDES Permit Number WQ0013786002, Effluent Limitations and Monitoring Requirements Numbers 1 and 6 for Outfall 001, by failing to comply with the permitted effluent limits for Facility 2; PENALTY: $20,721; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175 (512) 239-1297; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800, (Facility 1 and Water System); and Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335, (Facility 2).

(7) COMPANY: Earth Haulers, Inc.; DOCKET NUMBER: 2007-0471-MSW-E; TCEQ ID NUMBER: RN100950989; LOCATION: 11500 Mosier Valley Road, Fort Worth, Tarrant County; TYPE OF FACILITY: sand mining operation; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $15,300; STAFF ATTORNEY: James Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Eggemeyer Land Clearing, LLC; DOCKET NUMBER: 2008-1227-MSW-E; TCEQ ID NUMBER: RN105584809; LOCATION: Pue Road and West United States (US) Highway 90, San Antonio, Bexar County; TYPE OF FACILITY: mulching facility; RULES VIOLATED: 30 TAC §328.5(b), by failing to notify the TCEQ prior to commencement of new operations; 30 TAC §37.921 and §328.5(c) and (d), by failing to submit a written closure cost estimate to the TCEQ and to obtain and maintain financial assurance for the closure of a recycling facility that stores combustible materials outdoors; and 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan; PENALTY: $3,921; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: Highland Park Water Supply Corporation; DOCKET NUMBER: 2008-1488-PWS-E; TCEQ ID NUMBER: RN101254407; LOCATION: approximately one half mile northwest of the intersection of County Roads (CR) 3590 and 3570 on CR 3590, near Valley Mills, Bosque County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.45(b)(1)(C)(i) and THSC, §341.0315(c), by failing to provide a well capacity of 0.6 gallons per minute (gpm) per connection; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0315(c), by failing to provide two or more pumps having a total capacity of 2.0 gpm per connection at each pump station or pressure plane; 30 TAC §290.46(n)(3), by failing to maintain copies of well completion data such as well material setting data, geological log, scaling information (pressure cementing and surface protection), disinfection, information, microbiological sample results, and a chemical analysis report of a representative sample of water from the well kept on file as long as the well remains in service; 30 TAC §290.46(m)(1)(A), by failing to perform an annual inspection of the facility's ground storage tank; 30 TAC §290.46(m)(1)(B), by failing to conduct an annual inspection of the facility's pressure tank; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter at least once every three years; and 30 TAC §290.46(t), by failing to maintain a legible sign at each production, treatment and storage facility that includes the name of the water supply and an emergency telephone number where a responsible official can be contacted; PENALTY: $997; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Jerome Gomer; DOCKET NUMBER: 2009-0145-WQ-E; TCEQ ID NUMBER: RN105666952; LOCATION: 407 Saint John Avenue, Nolanville, Bell County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activity; PENALTY: $3,000; STAFF ATTORNEY: Sharesa Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(11) COMPANY: Lewis Blessing, L.P. dba Blessing Mobile Home Park; DOCKET NUMBER: 2007-0878-PWS-E; TCEQ ID NUMBER: RN102690302; LOCATION: 1102 Martin Avenue, Round Rock, Williamson County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(j), by failing to complete a customer service inspection certificate prior to providing continuous water service to new construction; 30 TAC §290.46(f)(2), by failing to provide public water system operating records at the time of the investigation; and 30 TAC §290.46(e), by failing to ensure that the production, treatment, and distribution facilities of the public water system are operated at all times under the direct supervision of a water works operator who holds an applicable, valid license; PENALTY: $1,656; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(12) COMPANY: Master Medical Equipment, Inc. dba The Living Stone; DOCKET NUMBER: 2008-0178-WQ-E; TCEQ ID NUMBER: RN100720218; LOCATION: 201 Easy Young Street, Llano, Llano County; TYPE OF FACILITY: stone yard; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities to waters in the State; PENALTY: $2,100; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(13) COMPANY: MPR Investments, LLC dba Oak Ridge Square Mobile Home Park; DOCKET NUMBER: 2004-1188-MWD-E; TCEQ ID NUMBER: RN101613461; LOCATION: 248 East Bethesda Road, Burleson, Johnson County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and TPDES Permit Number 13376-001, Sludge Provision Number B.1., by failing to submit the Annual Sludge Report that was due on September 1, 2003; 30 TAC §§305.125(1), (4), and (5), 317.4(d) and (g), and 317.6(b)(1), TPDES Permit Number 13376-001, Operational Requirements Number 1, Permit Conditions Numbers 2(g), Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, and TWC, §26.121(a), by failing to maintain operation of the facility treatment units to adequately treat wastewater, by failing to adequately maintain the facility pump/blower, clarifier, and chlorine contact chamber to obtain adequate wastewater treatment, by failing to prevent the unauthorized discharge of inadequately treated wastewater, and by failing to comply with permitted effluent limits; 30 TAC §305.125(9) and §319(d), TPDES Permit Number 13376-001, Monitoring and Reporting Requirements Numbers 1, 7(a) and 7(b)(i), by failing to submit noncompliance notification for the unauthorized discharge of inadequately treated wastewater and the upset condition of the facility, and by failing to submit monthly DMRs as required; 30 TAC §305.125(1) and §319.7(a), TPDES Permit Number 13376-001, Monitoring and Report-

ing Requirements Number 3(b) and Operations Requirements Number 1, by failing to maintain sampling records, and operation and maintenance records on site, and 30 TAC §21.3(b)(1) and §290.51(a)(3) and TWC, §5.702, by failing to pay the assessed Consolidated Water Quality late fees for Fiscal Year 2005 for Account Number 23003917, and by failing to pay the assessed Public Health Service fee and associated late fees for Fiscal Year 2002 - 2004 for Account Number 90200183; PENALTY: $14,650; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Petroleum Wholesale, L.P. dba Sunmart 168; DOCKET NUMBER: 2008-0503-PST-E; TCEQ ID NUMBER: RN102009602; LOCATION: 3800 North Interstate 35, Georgetown, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.51(b)(2)(C) and TWC, §26.3475(c)(2), by failing to equip the UST system with overfill prevention equipment; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the UST system within 30 days from the date of occurrence of the change or addition; 30 TAC §334.45(c)(3)(A), by failing to install and maintain a secure anchor at the base of each emergency shutoff valve in the piping system in which regulated substances are conveyed to an aboveground dispensing unit; and 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; PENALTY: $6,600; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(15) COMPANY: Petroleum Wholesale, L.P. dba Sunmart 443; DOCKET NUMBER: 2008-0512-PST-E; TCEQ ID NUMBER: RN102050507; LOCATION: 10841 Bissonnet Street, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.242(3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: $2,375; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(16) COMPANY: Ray Carpenter dba Carpenter Dirt Work; DOCKET NUMBER: 2007-1807-MLM-E; TCEQ ID NUMBER: RN105114946; LOCATION: 3005 Central Texas Expressway, Lampasas, Lampasas County; TYPE OF FACILITY: composting facility; RULES VIOLATED: 30 TAC §328.5(h), by failing to have a fire prevention and suppression plan; 30 TAC §328.5(d), by failing to establish and maintain financial assurance for the closure of a composting facility that stores combustible materials outdoors; and 30 TAC §330.303(a) and TWC, §26.121(a)(1), by failing to prevent the discharge of wastewater into or adjacent to water in the State without authorization from the commission; PENALTY: $4,182; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, 2500, Waco, Texas 76710-7826, (254) 751-0335.

(17) COMPANY: River Bend Water Services, Inc.; DOCKET NUMBER: 2009-0355-PWS-E; TCEQ ID NUMBER: RN102681467; LOCATION: two miles south of the Intracoastal Waterway, Matagorda, Matagorda County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level (MCL) of 0.060 milligram per liter (mg/L) for haloacetic acids, based on a running annual average; and 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the MCL of 0.080 mg/L for total trihalomethanes, based on a running annual average; PENALTY: $645; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(18) COMPANY: Rupaul Mini Mart, Inc. dba All Seasons Food Store; DOCKET NUMBER: 2008-1844-PST-E; TCEQ ID NUMBER: RN102247459; LOCATION: 5700 Gessner Drive, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of the discovery; and 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; PENALTY: $11,320; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(19) COMPANY: Samuel Fachorn; DOCKET NUMBER: 2008-0578-MLM-E; TCEQ ID NUMBER: RN105370001; LOCATION: 2877 CR 216, Burleson County; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition of outdoor burning within the state of Texas; and 30 TAC §330.15(c), by failing to comply with the general prohibition of dumping or disposal of municipal solid waste within the state of Texas; PENALTY: $3,142; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: TCS Number 1 Management Company, L.L.C. dba Texas Country Store 1; DOCKET NUMBER: 2008-1327-PST-E; TCEQ ID NUMBER: RN102791191; LOCATION: 3701 North 16th Street, Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.74(2)(A) and §334.77(a)(3), and (4), by failing to conduct initial abatement measures and site check of contaminated soil in the excavated zone resulting from a prior confirmed release; PENALTY: $7,650; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-200902873
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 14, 2009

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or

requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 24, 2009.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 24, 2009.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Donna Stewart; DOCKET NUMBER: 2008-1257-PWS-E; TCEQ ID NUMBER: RN101194447; LOCATION: 20 Timber Ridge Drive, Atlanta, Cass County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(f)(3) and §290.122(b)(2) and Texas Health and Safety Code (THSC), §341.031(a), by failing to comply with the maximum contaminants level (MCL) for coliform and failing to provide public notice for exceeding the MCL for total coliform for the month of October 2007; 30 TAC §290.109(c) and §290.122(b)(2), by failing to collect a set of samples within 24 hours of being notified of a total coliform-positive sample result and by failing to provide public notice of the failure to collect repeat samples for the months of August and October 2007; and 30 TAC §290.109(c)(2)(F) and §290.122(b)(2), by failing to collect five routine distribution samples during the month following a total coliform-positive sample result and by failing to provide public notice of the failure to collect the appropriate number of samples the months of September and November 2007; PENALTY: $2,515; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: Elvi Lorena Hilton dba Mockingbird Cleaners; DOCKET NUMBER: 2008-0198-DCL-E; TCEQ ID NUMBER: RN104992896; LOCATION: 5555 East Mockingbird Lane, Dallas, Dallas County; TYPE OF FACILITY: dry cleaner drop station; RULES VIOLATED: 30 TAC §337.10(a), THSC, §374.102(a), and Default Order Docket Number 2006-0998-DCL-E, Ordering Provision 2.a., by failing to register the facility with the TCEQ by completing and submitting the required registration form to TCEQ for a dry cleaning drop station facility; PENALTY: $1,825; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-580.

TRD-200902874

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 14, 2009

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Notice of Receipt of Application and Intent to Obtain a New Municipal Solid Waste Permit

Proposed Permit No. 2361

APPLICATION. Micro Dirt, Inc. d.b.a. Texas Organic Recovery, 15500 Goforth Road, Creedmoor, Travis County, Texas 78610, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new Type V permit. The applicant is requesting a permit in order to provide for the storage, processing, and disposal activities associated with the processing of grease trap waste and the composting of grease trap waste, septage, and municipal sewage sludge with positively sorted paper, cardboard, yard trimmings, wood and vegetative food matter. The facility is located at 15500 Goforth Road, Creedmoor, Travis County, Texas 78610. The TCEQ received the application on May 13, 2009. The permit application is available for viewing and copying at the City of Creedmoor, City Hall, 12405 FM 1625, Creedmoor, Travis County, Texas 78610.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future

correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Micro Dirt, Inc. d.b.a. Texas Organic Recovery at the address stated above or by calling Mr. Robert H. Thonhoff, Jr., P.E. at (512) 328-6736.

TRD-200902889
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 15, 2009

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Notice of Response to Comments on Concentrated Animal Feeding Operation General Permit Number TXG920000

COMMISSION'S RESPONSE TO PUBLIC COMMENT

The executive director (ED) of the Texas Commission on Environmental Quality (TCEQ or commission) files this Response to Public Comment (Response) on Concentrated Animal Feeding Operation (CAFO) General Permit Number TXG920000. As required by Texas Water Code (TWC), §26.040(d) and Title 30 Texas Administrative Code (30 TAC) §205.3(e), before a general permit is issued, the ED prepares a response to all timely comments. The Response must be made available to the public and filed with the TCEQ, Office of the Chief Clerk, at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn.

The Office of Chief Clerk received timely comment letters from: Texas Association of Dairyman (TAD), Texas Cattle Feeders Association (TCFA), Texas Farm Bureau (TFB), Texas Pork Producers Association (TPPA), Texas Poultry Federation (TPF), Enviro-Ag Engineering (EAE), Upper Colorado River Authority (UCRA), Mr. Lloyd Crownover, U.S. Department of Agriculture-Natural Resources Conservation Service (NRCS), and U.S. Department of Interior-Fish and Wildlife Service (USFWS).

BACKGROUND

Permit Description

This permit action amends and reissues General Permit Number TXG920000. This general permit authorizes the discharge of manure, sludge, and wastewater from CAFOs under specific circumstances into and adjacent to water in the state. The general permit is applicable to Texas Pollutant Discharge Elimination System (TPDES) and State-only CAFOs statewide, including certain CAFOs in the dairy outreach program area (DOPA). The permit specifies the facilities that may be authorized under this general permit and those which must obtain other authorization.

Authorization under this general permit complies with the TPDES requirements in accordance with the Memorandum of Agreement (MOA) between the U.S. Environmental Protection Agency (EPA) and TCEQ dated September 14, 1998, for the delegation of the National Pollutant Discharge Elimination System (NPDES) program.

Procedural Background

The Notice of availability was published on January 29, 2009, in the *Amarillo Globe News, Comanche Chief, Hamilton Herald News, Nacogdoches Daily Sentinel,* and *Stephenville Empire-Tribune,* on January 31, 2009, in the *Dallas Morning News* and *Gatesville Messenger,* and on February 6, 2009, in the *Texas Register.* In addition, a public meeting was held on March 17, 2009 and public comments were accepted. The comment period ended on March 17, 2009.

Comments and responses are organized by section with general comments first. Some comments resulted in changes to the general permit. The comments resulting in changes are identified in the respective responses. All other comment resulted in no changes.

COMMENTS AND RESPONSES

General Comments

COMMENT 1:

UCRA states that even a minor amendment to the general conditions, such as the addition of monitoring requirements, results in an applicant being faced with restarting the permitting process from the beginning in seeking an individual permit. UCRA suggests that a mechanism in the existing rules might be considered to allow an expedited transition from the general permit process to the individual permit process.

RESPONSE 1:

If a facility is required to obtain an individual permit, a permit application must be submitted and processed according to the requirements in 30 TAC Chapters 39, 50, 55, and 305. The public participation component of these rules is in compliance with the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and those requirements may not be waived to expedite obtaining an individual CAFO permit.

COMMENT 2:

Mr. Crownover comments that surface water runoff from dairies passes through his property and into Palo Duro Creek. He is concerned about surface water contamination and the safety of local drinking water.

RESPONSE 2:

The general permit contains numerous provisions designed to protect surface water. These protective measures apply to both the production area where the animals are confined and the land application areas where manure, sludge, and wastewater are land applied.

The general permit does not allow the discharge of manure, sludge, or wastewater from a CAFO into or adjacent to surface water in the state, except when chronic or catastrophic rainfall, or catastrophic conditions cause an overflow from a retention control structure (RCS) that has been properly designed, constructed, operated, and maintained. Any swine, veal, or poultry CAFO subject to the new source performance standards in 40 Code of Federal Regulations (CFR) §412.46 must have an RCS designed and constructed to meet or exceed the capacity required to contain runoff and direct precipitation from the 100-year, 24-hour rainfall event. Any other CAFOs must have an RCS designed and constructed to meet or exceed the capacity required to contain the runoff and direct precipitation from the 25-year, 24-hour rainfall event.

Manure, sludge, and wastewater generated by a CAFO must be retained and used in an appropriate and beneficial manner as provided in this general permit and the TCEQ rules. Discharges of wastewater from irrigation areas are prohibited. However, precipitation-related runoff from application areas is allowed by the permit, when consistent with a nutrient management plan (NMP). Land application of manure, sludge, and wastewater must ensure the beneficial use of nutrients by the cover crop, based upon the agronomic rate, and must be based on the total nutrient concentration on a dry weight basis. Vegetative buffer strips shall be maintained between land application areas and water in the state. The minimum buffer must be no less than 100 feet of vegetation, unless wastewater irrigation is applied by low-pressure, low-profile center pivot irrigation systems in areas of the state where the annual average rainfall is less than 25 inches per year. Land application of manure, sludge, and wastewater into surface water in the state is an unauthorized discharge and is prohibited.

COMMENT 3:

Mr. Crownover comments that the area surrounding his property near Stratford, Texas is overstocked already and that no more dairies or feedlots should be allowed.

RESPONSE 3:

The TCEQ's jurisdiction is established by the legislature and is limited to the issues set forth in statute. Accordingly, the TCEQ does not consider CAFO density within a given area; when considering whether to issue a CAFO authorization under the general permit nor can the TCEQ prohibit owners and operators from seeking authorization to operate a CAFO.

COMMENT 4:

USFWS has concerns about the impact of CAFOs and their associated discharges on threatened or endangered species, which may occur adjacent to, and in particular to aquatic species that occur downstream from these facilities. USFWS is also concerned about the impact of CAFOs on USFWS trust lands, such as Buffalo Lake National Wildlife Refuge. USFWS is also concerned about the impacts that pharmaceuticals, such as growth hormones, used on CAFOs could have on threatened or endangered species and USFWS trust lands. USFWS requested a meeting with TCEQ to discuss this issue and best management practices.

RESPONSE 4:

The ED met with USFWS representatives on April 8, 2009. During the meeting, the items in the remainder of this response were discussed.

The EPA is required to adopt regulations in compliance with the Clean Water Act (CWA) and the Endangered Species Act (ESA). By adopting the CAFO rules under 40 CFR Chapter 122 and Chapter 412, EPA acknowledges that the rules comply with both acts. TCEQ has complied with the MOA with EPA by incorporating 40 CFR Chapter 122 and Chapter 412 into the TCEQ rules and the general permit, and therefore, meeting the requirements of the ESA.

The Texas Surface Water Quality Standards are rules that designate the suitable uses or purposes of the state's water bodies; establish numerical and narrative goals for water quality throughout the state; and provide a basis for TCEQ regulatory programs that can establish reasonable methods to implement and attain the state's goals for water quality. Designated uses include aquatic life use, contact recreation, public water supply, and fish consumption. Texas Surface Water Quality Standards are approved by EPA. The state produces a periodic report, the *Texas Water Quality Inventory and 303(d) List,* which is an overview of the water quality conditions in comparison to established standards, including concerns for public health, fitness for use by aquatic species and other wildlife, and specific pollutants and their possible sources. This document is also approved by EPA. When water quality standards are met, aquatic life is protected. When water quality standards are not met, TCEQ will typically develop a Total Maximum Daily Load (TMDL), which determines the maximum loading of a given pollutant that a waterbody can assimilate while still meeting water quality standards. EPA rules do not establish water quality standards for pharmaceuticals or water quality based effluent limitations related to discharge of pharmaceuticals by CAFOs. Additionally, the best management practices (BMPs) proposed by USFWS have not been evaluated for effectiveness at reducing pharmaceuticals in CAFO discharges or storm water runoff from land application areas.

In the 2003 rulemaking, EPA addressed nutrient impacts to waters of the United States from CAFOs by requiring all CAFOs to develop and implement an NMP. The NMP requirements in the general permit exceeded the 2003 EPA requirements until December 2008, at which time EPA adopted NMP requirements similar to those already established in Texas.

The general permit does not authorize discharges into or adjacent to water in the state, except under chronic or catastrophic rainfall and catastrophic conditions from properly designed, constructed, operated, and maintained RCSs. The design, construction, operation, and maintenance requirements are equivalent to or more stringent than EPA rules (designed by a licensed Texas Professional Engineer, water balance, embankment, and liner). Unauthorized discharges are subject to enforcement action.

The general permit requires soil samples to be collected annually from 0 - 6 inches and 6 - 24 inches. The 0 - 6 inch sample is used to determine the appropriate application rate. The 6 - 24 inch soil sample is used to identify potential impacts during permit actions.

The general permit requires that each RCS be adequately lined to prevent impacts to groundwater from contaminated wastewater. Liners must be designed and constructed to have hydraulic conductivities no greater than 1×10^{-7} centimeters per second (cm/sec), with a thickness of 18 inches or its equivalency in other materials, and not to exceed a specific discharge through the liner of 1.1×10^{-6} cm/sec with the water level at spillway depth.

CAFOs may or may not be the only source of nutrients impacting Buffalo Lake. Non-point sources can contribute to increased nutrient levels in a water body. Buffalo Lake and the watershed upstream from Buffalo Lake are not currently being sampled to determine compliance with water quality standards due to the lack of flow. However, Upper Prairie Dog Town Fork Red River, Segment 0229, which is described as from a point 100 meters upstream of the confluence of Salt Fork Creek in Armstrong County to Lake Tanglewood Dam in Randall County, is sampled. The current CWA §303(d) list identifies a portion of segment

0229 (Palo Duro Canyon State Park upstream boundary to upper end of segment at Tanglewood Dam) as being impaired for pH. The segment is not impaired for bacteria or nutrients.

The general permit requires new and significantly expanding CAFOs to publish notice of the ED's preliminary determination on the Notice of Intent (NOI) and technical application at least once in a newspaper of general circulation in the county in which the CAFO is located or proposed to be located. This notice must provide opportunity for the public to submit comments on the NOI and ED's technical summary. In addition, the notice allows the public to request a public meeting on a new CAFO, which will be held if there is significant public interest. The public comment period begins on the first date the notice is published and ends 30 days later, unless a public meeting is held. The public and USFWS may submit written comments to the TCEQ during the comment period. The ED, after considering public comment, will approve or deny the NOI based on whether the NOI and technical application meet the requirements of this general permit.

Based on the items, the general permit should be protective of threatened and endangered species and USFWS trust lands, such as Buffalo Lake National Wildlife Refuge.

Part I. Definitions

COMMENT 5:

NRCS recommends adding a definition for "buffer" and "setback" because the current regulations do not clearly distinguish between buffers and setbacks. This causes some confusion, especially where land application is concerned. NRCS recommends revising Part III.A.4.(c)(1), (2) and (5) to substitute the term "setback" or "setback zones" everywhere the term "buffer" is mentioned to avoid confusion between the two.

RESPONSE 5:

The terminology used in the general permit to protect wells and waters in the state contain adequate descriptions, so additional definitions are not needed. The term used to identify how far land application areas have to be from water in the state is called the "vegetative buffer zone." The term used in the general permit to identify how far land application areas, pens, and RCSs have to be from water wells is called the "buffer zone." The buffer zone areas do not have to be vegetated.

COMMENT 6:

NRCS requests clarification on why chronic or catastrophic rainfall events are not included in the definition of catastrophic conditions.

RESPONSE 6:

The general permit defines chronic or catastrophic rainfall event as: "a series of rainfall events that do not provide opportunity for dewatering a retention control structure and that are equivalent to or greater than the design rainfall event or any single rainfall event that is equivalent to or greater than the design rainfall event." Catastrophic conditions are: "conditions which cause structural or mechanical damage to the AFO from natural events including high winds, tornados, hurricanes, or other natural disasters, other than rainfall events."

The definition of catastrophic conditions excludes rainfall events as catastrophic conditions because the general permit requires RCSs to be designed to contain the runoff and direct precipitation from the design rainfall event. If "other than chronic or catastrophic rainfall events" were added to the definition of catastrophic conditions, rainfall events smaller than the designed rainfall event would meet the definition of catastrophic conditions and would be authorized discharges. This would not meet the effluent limitations established by 40 CFR Chapter 412.

COMMENT 7:

TAD, TCFA, TFB, TPPA, and TPF recommend that TCEQ recognize that Certified Crop Advisors serve an integral role in the crop and nutrient management at many CAFOs. They recommend that Certified Crop Advisors be added to the definition of "Certified Nutrient Management Specialists."

RESPONSE 7:

Certified Crop Advisors have a much broader area of expertise, which may or may not include nutrient management. For example, some Certified Crop Advisors specialize in pest management and have limited knowledge of nutrient management. To become a Certified Nutrient Management Specialist, a person is required to take a course in nutrient management and pass a written test to demonstrate their knowledge and skills related to nutrient management. Requiring a Certified Nutrient Management Specialist to certify NMPs and nutrient utilization plans (NUPs) ensures that an individual is very knowledgeable in nutrient management practices.

COMMENT 8:

NRCS recommends that the definition of "liner" be modified to reflect the difference between an RCS constructed with a liner and one constructed using in-situ material.

RESPONSE 8:

The definition of liner in the general permit is worded so that it applies to in-situ material, a constructed liner, and geosynthetic liners. The requested change is not necessary.

COMMENT 9:

NRCS recommends revising the definition of "nutrient management plans" because the definition needs to include NRCS Practice Standard Code 633 (Waste Utilization) since it works together with NRCS Practice Standard Code 590. NRCS also recommends specifying Texas Standards, which differ from national standards.

RESPONSE 9:

The requirements in NRCS Practice Standard Code 633 are similar to many of the requirements of the general permit. By complying with the requirements of the general permit, a facility meets many of the requirements in NRCS Practice Standard Code 633.

COMMENT 10:

NRCS and EAE recommend revising the definition of "nutrient utilization plan." EAE recommends that the definition of NUP be revised to match Part III.A.13. NRCS recommends the following language:

Nutrient Utilization Plan (NUP) - A nutrient management plan specific to Land Management Units with excessive soil test phosphorus levels. Organic and inorganic phosphorus and nitrogen application rates are based on the amounts removed by harvested crops rather than land grant university approved nutrient recommendations.

RESPONSE 10:

To maintain consistency within the rules, the requested change was not made.

COMMENT 11:

NRCS comments that the current definition of the 100-year floodplain does not reflect that flooding must be from a water source.

RESPONSE 11:

It is commonly known that floods are caused by the inundation of water. The requested change is not necessary.

COMMENT 12:

NRCS recommends adding a definition for phosphorus index because the Texas Nutrient Management Standard uses the Phosphorus Index as the principal tool to determine the amount of agricultural waste that can be applied to the land.

RESPONSE 12:

The term phosphorus index is used only once in the general permit. The commission declines to add a definition of phosphorus index, but in response to the comment agrees to add the following sentence to Part III.A.11(e)(3)(a): "The phosphorus index rating must be calculated using the NRCS Phosphorus Assessment Tool for Texas, Agronomy Technical Note Number 15, as amended."

COMMENT 13:

EAE states that the definition of "significant expansion" is confusing and recommends that the phrase "any change" needs to be reworded to indicate that once the 50% increase in waste production is exceeded, then it qualifies as a significant expansion. Another alternative would be to make this clear in the definition of "notice of change" (NOC).

RESPONSE 13:

Significant expansions are subject to the public participation process as outlined in Part II.C.2. of the general permit, whereas NOCs are not subject to public participation. Part (a) allows facilities to increase waste production up to 50% of the initial authorization through the NOC process; only requiring public participation for increases above 50%. Part (b) requires any change that increases waste production after five years from the date of authorization for a facility to be subject to the public participation requirements for significant expansions, regardless of whether the facility has utilized the 50% increase allowed through the NOC process in Part (a).

Rather than make this time limit retroactive for facilities authorized prior to the effective date of the general permit, (b)(2) gives these facilities a deadline of July 20, 2014, to utilize the NOC process to increase waste production up to 50% of the initial authorization in accordance with Part (a) of the definition, if they have not done so already.

COMMENT 14:

NRCS suggest the following minor change to the definition of sludge, ". . . 30 TAC Chapter 312 rules pertaining to municipal and industrial sludge do not apply to this permit."

RESPONSE 14:

As currently written, none of the requirements in 30 TAC Chapter 312 apply to the general permit. The recommendation by the commenter could potentially allow portions of 30 TAC Chapter 312 rules to apply to the general permit. The commission declines to make this change.

COMMENT 15:

EAE comments that there is some confusion in the definition of "slurry" regarding material that is between 2% and 3%, since less than 2% is considered wastewater and greater than 3% is considered slurry.

RESPONSE 15:

The word "slurry" is not used in the general permit. Therefore, a definition is not necessary. In response to the comment, the definition of "slurry" was deleted.

Part II. Permit Applicability and Coverage

COMMENT 16:

Part II.C.3. EAE states that estimated land application rates should be removed from the NOI. Each facility is required to have an NMP that includes the estimated application rates, which will change from year to year based on yearly sampling of land management units (LMUs). Providing this value on the NOI only gives a representation of the year/plan at the time the NOI was submitted and becomes invalid when the NMP is updated.

RESPONSE 16:

The NOI is a summary of the technical data that supports the ability of the facility to meet the general permit. This gives the public an understanding of what the land application rates may be, without having to be able to read and interpret the NMP. The Technical Summary for each draft authorization under the general permit states that the land application rates are subject to change during the term of the permit.

COMMENT 17:

NRCS recommends that the NOI include the estimated acres needed to apply manure, litter, or wastewater at the phosphorus removal rate of the harvested crops using the crop parameters in the current NMP. NRCS states that this information is needed to determine resource sustainability. Without this information, many permitted operations eventually get into situations where they cannot apply wastes at agronomic rates due to insufficient land base.

RESPONSE 17:

The general permit requires that manure, sludge, and wastewater must be applied at agronomic rates and hydrologic needs. In the event that the CAFO operator cannot land apply all of the manure, sludge, or wastewater generated, they must export any remaining amount or find an alternative use for the material.

Long term sustainability of a facility may be a planning consideration, but there are no rule requirements that a facility be sustainable for the permit term.

COMMENT 18:

Part II.C.7. TAD, TCFA, TFB, TPPA, and TPF recommend that TCEQ allow transfer of a general permit authorization from one owner to another owner without submission of a Notice of Termination (NOT) and new NOI. EAE states that for a change of ownership, the statement "not later than 10 days prior" is not practical in cases where a business/real estate transaction has not yet closed. EAE states that a CAFO operator is not going to be willing to terminate their authorization prior to the real estate closing in case the deal does not go through. EAE recommends that Part II. C. 7. should read ". . . not later than 10 days after."

RESPONSE 18:

General permits issued by the commission must comply with 30 TAC Chapter 205 (related to General Permits for Waste Discharges) and those rules do not allow transfer of a general permit authorization. 30 TAC §205.4(h) states:

. . . In cases where the general permit requires that an NOI be submitted, the general permit shall require that when the ownership of the facility changes or is transferred, a notice of termination be submitted by the present owner, and a new NOI be submitted by the new owner, no later than ten days prior to the change in ownership.

COMMENT 19:

Part II.G. EAE states that a new CAFO that obtains authorization after 2009 should have the full five years to construct.

RESPONSE 19:

30 TAC §205.4(a) states that a qualified discharger may obtain authorization to operate under a general permit by complying with the general permit's conditions for gaining coverage. Part II.G. does not re-

quire that a new CAFO be operated at full capacity within 18 months, just that it be constructed within that time frame. A new CAFO operator should not seek general permit authorization unless he/she intends to construct and operate a CAFO within 18 months of authorization.

Part III. Pollution Prevention Plan Requirements

COMMENT 20:

EAE states that Part III.A.3.(b) should be revised to ". . . preventative measures to *minimize* impacts. . ." because the certifying party cannot certify absolute prevention to adverse impacts of potential recharge features.

RESPONSE 20:

30 TAC §321.34(f)(4) states that the pollution prevention plan (PPP) must prevent impacts to an aquifer from any recharge feature present. The proposed revision would be less stringent than the rule requirement. Therefore, the suggested change was not made.

COMMENT 21:

NRCS recommends revising Part III.A.4.(b) to describe how the CAFO operator identifies areas that have a high potential for soil erosion.

RESPONSE 21:

The general permit requirement should be sufficient to require the CAFO operator to identify areas that have a high potential for significant soil erosion. It is not necessary to prescribe how the CAFO operator identifies these areas.

COMMENT 22:

TAD, TCFA, TFB, TPPA, and TPF state that it is redundant and confusing for Part III.A.4.(c)(2) of the general permit to require: "Documentation supporting variances of the buffer zones which were previously authorized must be kept on-site and made available to TCEQ personnel upon request." They comment that the recharge feature certification serves as "documentation" for the CAFO and TCEQ and recommend deletion of the previous sentence.

RESPONSE 22:

In response to the comment, Part III.A.4.(c)(2) was revised to read: "For new wells drilled after July 20, 2004, documentation supporting variances of the buffer zones which were previously authorized must be kept on-site and made available to TCEQ personnel upon request." This clarifies that existing wells drilled before July 20, 2004, and any replacement wells, must be protected in accordance with the recharge feature certification requirements which serves as documentation and a separate variance request is not necessary. The language also clarifies that new wells drilled after July 20, 2004, must meet the requirements of the recharge feature certification and a variance request is submitted to the TCEQ if the buffer zone is not met.

In addition, the changes to this section in conjunction with the requirements in Part III.A.4.(c)(5), provides assurance that only new water wells that do not meet the buffer zone from RCSs, LMUs, or holding pens are required to initiate a buffer variance request. Buffer variance requests are also required for new LMUs, where existing water wells are in use and do not meet the buffer zone.

COMMENT 23:

EAE recommends deleting Part III.A.4.(c)(3) because it is in conflict with 16 TAC §76.300(1), Exemptions.

RESPONSE 23:

The commission agrees that the general permit should defer water well drilling requirements to 16 TAC §76. In response to this comment Part III.A.4.(c)(3) was revised as follows: "Construction of any new water well must be done in accordance with the requirements of this general permit and 16 TAC §76, relating to Water Well Drillers and Water Well Pump Installers."

COMMENT 24:

TAD, TCFA, TFB, TPPA, and TPF comment that Part III.A.5.(c) of the draft permit, as written, would require wastewater discharges to be sampled and analyzed by a person employed by a National Environmental Laboratory Accreditation Conference (NELAC) accredited lab. They recommend that the word "sampled" be removed from the sentence. They also note that TCEQ should recognize that not all monitoring parameters have been accredited by NELAC.

RESPONSE 24:

In response to the comment, Part III.A.5.(c) was revised as follows: "The permittee shall sample all discharges to surface water in the state from RCSs and LMUs. The effluent shall be analyzed by a National Environmental Laboratory Accreditation Conference (NELAC) accredited lab for the following parameters. . . ."

COMMENT 25:

TAD, TCFA, TFB, TPPA, and TPF recommend that TCEQ add language that would clarify the requirements for discharges that occur outside of normal business hours. They suggest adding the following sentence to Part III.A.5(d):

In cases where the CAFO operator is required to collect a wastewater discharge sample outside of normal business hours, the samples shall be preserved and stored as required for each parameter and delivered to the laboratory on the next business day.

RESPONSE 25:

It is true that discharges may occur outside of the normal laboratory business hours, which could cause a sample to exceed the maximum hold times required for a given test method. In response to this comment, the following sentence was added to Part III.A.5(d):

In the event that a discharge occurs outside of the normal business hours of the testing laboratory which causes the maximum hold time to lapse, the permittee shall collect a secondary sample from the RCS, in addition to the sample collected in accordance with Part III.A.5(c), and have it analyzed on the first business day for each parameter in which the maximum hold time has been exceeded.

COMMENT 26:

EAE states that for all new construction, the RCS design is based on the designed confinement area and head count (number of animals) at the time of construction, not necessarily the maximum authorized head count.

RESPONSE 26:

A discharge is authorized under certain circumstances from a properly designed, constructed, operated, and maintained RCS. The RCS must be capable of receiving waste generated by the maximum authorized head count, including the confinement area. The engineering design provides the minimum required volume of the RCS(s) to prevent an unauthorized discharge when the maximum authorized head count is present at the facility. In the event that the maximum authorized head count is increased, the RCS(s) must be enlarged to accommodate the waste produced by the additional animals prior to confining additional animals at the facility.

COMMENT 27:

EAE states that the design of a pond should contain "wet" manure and process generated wastewater. They recommend that the word "all" should be removed from Part III.A.6.(d)(2).

RESPONSE 27:

The RCS must be designed for any and all manure directed to it, regardless of whether it is wet or dry. In the event that dry manure is scraped into the RCS, the minimum required volume of the RCS must account for the storage of the manure to prevent an unauthorized discharge.

COMMENT 28:

NRCS comments that Part III.A.6(f) related to Embankment Design and Construction does not include any requirements for the design of the facility. NRCS recommends that the following language be included in Part III.A.6(f): "Embankment Design - Embankments shall be designed in accordance with good engineering practices. The design shall be certified by a licensed Texas professional engineer or NRCS engineer."

RESPONSE 28:

Part III.A.6(a) requires that all design and completed construction must be certified by a licensed Texas professional engineer prior to use for a new RCS or for modifications of an existing RCS. Part III.A.6(b) requires that each RCS be designed and constructed in accordance with the technical standards developed by the NRCS, American Society of Agricultural and Biological Engineers, American Society of Civil Engineers, American Society of Testing Materials, or other technical standards approved by the ED that are in effect at the time of construction. Both of these provisions of the general permit apply to RCS design and construction, including embankments.

COMMENT 29:

NRCS suggests adding the following sentence to Part III.A.6(f)(1): "Soils shall be suitable for the type of construction."

RESPONSE 29:

Part III.A.6(f)(1) and (2) describe soil requirements and the compaction requirements for the embankment. If a soil meets the soil requirements and is able to achieve the compaction requirement, it is suitable for use as an embankment material.

COMMENT 30:

NRCS recommends revising Part III.A.6(f)(5) to clarify the spillway design requirement and avoid confusion by reference to vague standards.

RESPONSE 30:

There are multiple considerations that go into the design of a spillway, including discharge prohibitions, dam safety, topography, site specific conditions, etc. While all of these considerations may not be found in a single NRCS practice standard, NRCS has design criteria for each of these considerations. It is not necessary to identify each NRCS technical guidance document in the general permit.

COMMENT 31:

NRCS recommends revising Part III.A.6(f)(6) to clarify the measured depths and provide adequate embankment protections. NRCS recommends the following language:

. . . and the structure's spillway crest. There must be a minimum of one vertical foot of materials between the top of the embankment and the design flow depth of the spillway in accordance with the requirements in (5). RCSs without spillways must have a minimum of two vertical feet between the top of the embankment and the required storage capacity.

RESPONSE 31:

The general permit mirrors the requirements in 30 TAC §321.38(g)(2), which requires that for all new construction and for all structural modifications of existing RCSs, each RCS must have a minimum of two vertical feet of materials equivalent to those used at the time of design and construction between the top of the embankment and the structure's spillway. RCSs without spillways must have a minimum of two vertical feet between the top of the embankment and the required storage capacity, including any additional storage required by an alternative standard. Therefore, the requirements in the rule and general permit should be adequate.

COMMENT 32:

NRCS recommends that the embankment construction documentation include copies of construction certifications to show that it meets the applicable requirements and is in accordance with good engineering practices.

RESPONSE 32:

Part III.A.6(f) provides sufficient requirements for the design, construction, and testing of embankments to ensure that these structures are structurally acceptable and will protect the environment from dam failure.

COMMENT 33:

NRCS recommends that Part III.A.6(g) be retitled to "Seepage Limitations and Lining Requirements." Additionally, NRCS recommends revising the first paragraph to clarify that the RCSs must meet the lack of hydrologic connection criteria or meet the seepage limitation criteria.

RESPONSE 33:

The commission partially agrees with this comment. Part III.A.6(g) was revised to note that a lack of hydrologic connection is not necessarily a liner. The provision now reads as follows:

For all new construction and for all structural modifications of existing RCSs only, each RCS must meet the requirements for lack of hydrologic connection or have a liner consistent with paragraph (2), (3), or (4) below.

No change was made to the title of Part III.A.6(g).

COMMENT 34:

EAE recommends deleting the phrase "tested at optimum moisture content" in Part III.A.6.(g)(1)(i). EAE notes that this test cannot be performed on in-situ materials. The permeability can only be tested at the moisture content of the in-situ soils.

RESPONSE 34:

In response to the comment, the phrase "tested at optimum moisture content" in Part III.A.6.(g)(1)(i) was deleted.

COMMENT 35:

EAE recommends that the statement that the CAFO operator should include maps showing groundwater flow paths or that the leakage enters a confined environment should be removed from Part III.A.6.(g)(1)(ii). EAE comments that this should be at the discretion of the certifying engineer whether to include this documentation with the certification. Lack of hydrologic connection means no connection to groundwater, so maps are not necessary.

RESPONSE 35:

The documentation provides support for the findings of the professional engineer or geoscientist. Submittal of this information allows TCEQ

and the public the opportunity to review the documentation and make an independent determination of the lack of hydrologic connection.

COMMENT 36:

NRCS suggests that the seepage limitations (specific discharge requirements) be moved to its own section. The liners or in-situ materials must be adequate to meet these limitations. NRCS proposes the following language:

Seepage Limitations. All RCSs constructed after July 2009 shall be designed and constructed with a specific discharge not to exceed 1.1 x 10^{-6} cm/sec calculated using Darcy's law. The depth used in Darcy's law shall be from the bottom elevation of the RCS and the crest of the spillway. A licensed Texas professional engineer or licensed Texas professional geoscientist shall provide a certification of the calculated specific discharge using the constructed parameters and laboratory results.

RESPONSE 36:

The commission partially agrees with this comment. However, the commission prefers to keep the specific discharge and hydraulic conductivity requirements together because they work in concert with each other to protect groundwater. In response to the comment, Part III.A.6(g)(3)(ii) was revised as follows:

Liners shall be designed and constructed to have hydraulic conductivities no greater than 1 x 10^{-7} centimeters per second (cm/sec), with a thickness of 18 inches or its equivalency in other materials, and not to exceed a specific discharge through the liner of 1.1 x 10^{-6} cm/sec calculated using Darcy's Law with a water level at spillway depth.

COMMENT 37:

NRCS suggests including the hydraulic conductivity requirements for in-situ materials in Part III.A.6(g)(2) to avoid potential confusion with cross-references.

RESPONSE 37:

Cross-references are used to avoid excessive duplication. No change was made in response to the comment.

COMMENT 38:

NRCS suggests revising the title of Part III.A.6(g)(2) and (3).

RESPONSE 38:

In response to the comment, the title of Part III.A.6(g)(2) was revised to: "RCS Liner using In-Situ Material" and the title of Part III.A.6(g)(3) to: "Constructed or Installed Earthen Liner."

COMMENT 39:

NRCS recommends that all of the requirements for geosynthetic liners be placed in the same location to avoid confusion.

RESPONSE 39:

In response to the comment, Part III.A.6(g)(3)(iv) and Part III.A.6(g)(4)(iv) were combined as Part III.A.6(g)(4) and subsequent paragraphs were re-numbered.

COMMENT 40:

NRCS suggests clarification that the liner sampling requirements apply to in-situ material or earthen liners, but do not apply to geosynthetic liners.

RESPONSE 40:

The commission agrees that liner sampling requirements in Part III.A.6(g)(4)(i) - (iii) do not apply to geosynthetic liners. In addition to the changes noted in Response 40, the title of Part III.A.6(g)(4) was revised to: "Liner Sampling and Analyses of In-Situ Material or Earthen Liners."

COMMENT 41:

Relating to Part III.A.8(a), Manure Handling and Storage, NRCS recommends the use of site-specific data where it is available. Land availability is not a direct factor in determining the capacity requirements. Additionally, the Field Office Technical Guide does not include manure production values. NRCS recommends that this paragraph be revised as follows:

Manure and sludge storage capacity requirements shall be based on manure and sludge production values from site specific data where available or in the absence of such data values may be obtained from the NRCS Agricultural Waste Management Field Handbook or equivalent standards.

RESPONSE 41:

Land availability can play a role in manure storage capacity. If sufficient land is not available to apply the manure and sludge, it may have to be stored until determination of an alternative final disposition. The ED agrees that this provision of the general permit should not refer to the NRCS Field Office Technical Guide. Part III.A.8(a) was revised as follows: "Manure and sludge storage capacity requirements shall be based on manure and sludge production, land availability and NRCS or equivalent standards."

COMMENT 42:

NRCS recommends allowing the storage of manure or sludge outside of the RCS if the storage area has a minimum of 150 feet of vegetative material down gradient to protect water in the state.

RESPONSE 42:

The general permit allows storage of manure outside of the RCS drainage area if it is stored in a manner (i.e., storage shed, bermed area, tarp covered area, etc.) that otherwise prevents contaminated storm water runoff from the storage area. This provision complies with 30 TAC §321.38(h).

COMMENT 43:

TAD, TCFA, TFB, TPPA, and TPF note that it is acceptable for wastewater levels in the RCS to encroach on the volume reserved for the design rainfall event. They state that TCEQ should recognize that it is only necessary to document/record/justify those non-precipitation related incidents that elevate the water level in the RCS. They recommend that the second sentence of Part III.A.9.(a)(2) be revised to read: "If the water level in the RCS encroaches into the storage volume reserved for the design rainfall event (25-year or 100-year), for reasons other than precipitation, the pollution prevention plan must. . . ."

RESPONSE 43:

The general permit complies with 30 TAC §321.39(b)(2), which requires the operator to document conditions that result in the wastewater levels encroaching into the storage volume reserved for the design rainfall event. Neither the rules nor the general permit exclude precipitation related encroachments from the recordkeeping requirement.

COMMENT 44:

TAD, TCFA, TFB, TPPA, and TPF recommend that the general permit address collection and disposition of carcasses associated with a catastrophic event. They suggest adding the following sentence to Part III.A.10.(c): "In the event of a catastrophic loss of animals, carcasses will be collected and disposed of within a timeframe and method(s) as approved by the TCEQ and Texas Animal Health Commission."

RESPONSE 44:

The flexibility requested is already provided in the general permit because the commission can approve alternative plans for carcass collection and disposal. The general permit requires carcasses to be collected within 24 hours of death and properly disposed of within three days of death, *unless otherwise provided for by the commission.* In the event of a catastrophic loss of animals, the CAFO operator should notify their TCEQ regional office to coordinate the proper collection and disposal of the carcasses. It is recommended that each CAFO develop a plan for catastrophic loss of animals, in coordination with the applicable TCEQ regional office and the Texas Animal Health Commission, prior to such an event occurring.

COMMENT 45:

NRCS recommends revising Part III.A.11(a) as follows:

An NMP, developed by a certified Nutrient Management Specialist, must be in accordance with the Texas NRCS Nutrient Management Conservation Practice Standard (Code 590) and the Texas NRCS Waste Utilization Conservation Practice Standard (Code 633). In addition to the NRCS Conservation practices, the following general requirements must be met.

RESPONSE 45:

The general permit mirrors the CAFO rule relating to who can certify an NUP in 30 TAC §321.40(k)(3). These same individuals and entities should be allowed to certify an NMP. To clarify who can certify an NMP, Part III.A.11(a) was revised as follows:

A permittee of a Large CAFO must develop and implement an NMP, certified by an individual or employee of an entity identified in Part III.A.13(b), in accordance with Texas NRCS Practice Standard Code 590 upon coverage under this general permit. The NMP shall be updated annually to incorporate the most recent manure, sludge, wastewater, and soil analyses.

COMMENT 46:

NRCS states that Part III.A.11 should rely on the "Plans and Specs" section of Code 590 for most of these requirements (Code 633 defers to Code 590 for plans and specifications). NRCS states that it is redundant here because these things and more are required by Code 590 and notes that Paragraph 4 explains waste sampling. NCRS recommends adopting the 590 procedure because it is newer and provides better technology.

RESPONSE 46:

Part III.A.11 incorporates requirements found in 30 TAC Chapter 321, Subchapter B. While the rule and general permit requirements are reiterated in NRCS Practice Standard Code 590, it is not appropriate to delete them from the general permit.

COMMENT 47:

TAD, TCFA, TFB, TPPA, and TPF state that manure and wastewater are managed on an as-collected basis (wet basis). They recommend that Part III.A.11.(b)(3) be revised by replacing the phrase "on a dry weight basis" with "based on laboratory analysis that accounts for moisture."

RESPONSE 47:

The commission agrees that wastewater is not analyzed on a dry weight basis. In response to this comment, Part III.A.11.(b)(3) was revised as follows: ". . . Land application rates of manure, sludge and/or wastewaters shall be based on the total nutrient concentration, on a dry weight basis where applicable."

COMMENT 48:

TAD, TCFA, TFB, TPPA, and TPF state that many low-lying areas were converted to farmland many years ago and continue to be used for farmland today. They encourage TCEQ to recognize that many of these farmed areas should not be classified as surface water in the state. They recommend that the phrase: ". . . unless previously converted and used for agricultural production" be added to the last sentence of Part III.A.11(e)(1).

RESPONSE 48:

Determining whether or not a waterway meets the definition of surface water in the state should be made on a case-by-case basis. The ED has and will continue to review documentation presented by applicants showing that questionable areas do not meet the definition of water in the state.

COMMENT 49:

EAE recommends that Part III.A.11.(e)(3)(b)(i) should be deleted and only (e)(3)(b)(ii) should be included in the permit.

RESPONSE 49:

Part III.A.11.(e)(3)(b)(i) allows for an alternative to the filter strip or vegetative barrier requirements of (ii). There may be areas of the state that it is impractical to construct and/or maintain the filter strip or vegetative barrier.

COMMENT 50:

NRCS recommends revising Part III.A.12.(a)(2) by replacing the phrase "at least one representative soil sample" with "representative soil samples" and adding the following sentence: "The number of composite samples per LMU and the approved sampling methods are described in Part III.A.12.(c)(3)." The number of composite samples is discussed in paragraph (c) sampling procedures. There have been too many PPP's that collect one sample per LMU and ignore Part III.A.12.(c)(3).

RESPONSE 50:

The primary purpose of Part III.A.12.(a) and (b) is to identify sampling frequency, both initial and annual. Part III.A.12.(c) provides the procedures for collecting samples. As noted by the commenter, the number of samples to collect is identified in Part III.A.12.(c)(3). Failure to collect the required number of samples is a violation of the permit.

COMMENT 51:

EAE recommends replacing RG-408 "Soil Sampling for NUPs" with "Most recent version of RG-408" in Part III.A.12.(c)(1).

RESPONSE 51:

In response to the comment, the title of RG-408 was revised to "Soil Sampling for Concentrated Animal Feeding Operations."

COMMENT 52:

NRCS states that the general permit or a regulatory guidance document should explain what will be done with the 0 - 2 inch and 6 - 24 inch samples required by Part III.A.12.(c)(4). The 0 - 2 inch samples could be used to identify stratification issues (pH, Nitrogen, Phosphorus, and Calcium) and the 6 - 24 inch samples could be used for partial Nitrogen budgeting and determining if phosphorus is leaching into deeper profiles.

RESPONSE 52:

The 0 - 2 inch soil sample is used to identify the nutrient content of the soil that is exposed to surface runoff allowing re-suspension of nutrients from the soil into the runoff which may increase pollutant loading to water in the state. The 6 - 24 inch soil sample is used to identify

potential impacts during permit actions. It is not necessary to identify the uses of the data in the general permit.

COMMENT 53:

NRCS states that Part III.A.l3. can be eliminated, except (b), which identifies who can certify an NUP. NRCS notes that NUP's are more restrictive NMP's.

RESPONSE 53:

Part III.A.l3. is necessary for the following reasons: To identify when an NUP is required, identify who can certify an NUP, require submittal to and approval by the ED, define when land application under the NUP can commence, and detail what must be included in the NUP.

COMMENT 54:

NRCS recommends revising Part III.A.l3.(b) to only allow Texas certified nutrient management specialists to certify an NUP. To become certified, a person must demonstrate technical competency as well as an understanding of all the different policies that must be followed. NRCS does not support allowing certified professional agronomist, certified crop advisors, certified professional soil scientists, or other licensed geoscientist-soil scientist to develop NMPs without going through the certification process.

RESPONSE 54:

30 TAC §321.40(k)(3) identifies who can certify an NUP. The general permit mirrors the rule.

COMMENT 55:

TAD, TCFA, TFB, TPPA, and TPF state that TCEQ recognizes the option for meeting the daily inspection of water lines requirement by recording this information in the Weekly Report. They recommend the addition of a sentence to Part III.A.14.(a)(2) to read: "The Weekly Report can be used to document activities associated with daily inspections of water lines."

RESPONSE 55:

The commission agrees that daily inspections of water lines can be recorded on the PPP either daily or weekly. Based on this comment, the following sentence was added to Part III.A.14.(a)(2): "These daily inspections can be recorded in the PPP either daily or in the weekly report."

COMMENT 56:

TAD, TCFA, TFB, TPPA, and TPF state that Part III.A.15.(b)(4) should be written in a manner that is similar to the current CAFO General Permit. One subsection should pertain to Groundwater Monitoring Plans for CAFOs that utilize playas and one subsection should pertain to Groundwater Monitoring Plans required by the ED. As proposed, this new language would require Groundwater Monitoring Plans for CAFOs that utilize playas to have those plans developed and certified by a licensed Texas professional engineer or licensed Texas professional geoscientist. TWC does not require this for CAFOs utilizing playas.

RESPONSE 56:

In response to the comment, the following changes were made. Part III.A.15(b)(1) was revised as follows: "(1) A groundwater monitoring plan shall be implemented by a permittee if: (1) a playa is used as a RCS, as required by Texas Water Code §26.048, or (ii) if required by the executive director."

Part III.A.15(b)(2)(ii) was revised as follows: "having each sample analyzed for nitrate as nitrogen and chloride where a groundwater monitoring plan is required by (b)(1)(i), and for nitrate as nitrogen, total dissolved solids, and chloride, where a groundwater monitoring plan is required by (b)(1)(ii), and. . . ."

Also, Part III.A.15(b)(4) was revised as follows: "A groundwater monitoring plan required by (b)(1)(ii) shall be developed and certified by a licensed Texas professional engineer or licensed Texas professional geoscientist."

COMMENT 57:

Part III.B. NRCS believes that on-site composting is extremely beneficial for reducing pathogens and stabilizing manures. NRCS would like the general permit to allow for composting at locations associated with the CAFO that are not within the drainage basins of an RCS when a properly sized vegetative buffer is established and maintained down gradient from the composting operation.

RESPONSE 57:

The general permit allows composting outside of the RCS drainage area if it is roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff. This provision complies with 30 TAC §321.39(f).

TRD-200902867
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 14, 2009

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Notice of Water Quality Applications

The following notices were issued on July 9, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

INEOS USA LLC, which operates the Chocolate Bayou Plant, which manufactures organic chemicals, has applied for a renewal of TPDES Permit No. WQ0001333000, which authorizes the discharge of treated process wastewater, sanitary wastewater, utility wastewater, remediation and spill clean up wastewaters, and storm water at a daily average dry weather flow not to exceed 8,000,000 gallons per day via Outfall 001; commingled low volume wastewater, secondary flush process area storm water, fire water, condenser condensate with storm water on an intermittent and flow variable basis via Outfall 002; and storm water on an intermittent and flow variable basis via Outfalls 003, 004, and 005. The facility is located on the northwest side of Farm-to-Market Road 2004, approximately two miles south of the intersection of Farm-to-Market Road 2917 and Farm-to-Market Road 2004, Brazoria County, Texas.

CITY OF SEADRIFT, which operates Dallas Avenue Water Plant, a municipal water treatment plant, has applied for a major amendment to TPDES Permit No. WQ0003954000 to authorize the relocation of the discharge point. The current permit authorizes the discharge of reverse osmosis reject water at a daily average flow not to exceed 200,000 gallons per day via Outfall 001. The facility is located at 301 East Dallas, approximately 300 feet east of the intersection of Dallas Avenue and Main Street, on the north side of Dallas Avenue in the City of Seadrift, Calhoun County, Texas 77983. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Manage-

ment Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

TGS RAINBOW TERMINAL LLC which proposes to operate Rainbow Terminal Petcoke Handling Facility, a petroleum coke terminal, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004874000, to authorize the discharge of storm water runoff, dust suppression water, dock reclaim water, and equipment wash water on an intermittent and flow variable basis via Outfall 001. The facility is located at Highway 366 and 32nd Street, Jefferson County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF YOAKUM has applied for a renewal of TPDES Permit No. WQ0010463001 which authorizes the discharge of treated domestic wastewater at a daily flow not to exceed 950,000 gallons per day. The facility is located on the west side of Dunn Street and approximately one mile southwest of its intersection with State Highway 111 in Dewitt County, Texas.

PALO PINTO COUNTY has applied for a renewal of TPDES Permit No. WQ0011698001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located on the east bank of Town Branch Creek approximately 1,200 feet due north of the intersection of U.S. Highway 180 and Farm-to-Market Road 4 at the end of North Ninth Avenue in the outskirts of the town of Palo Pinto in Palo Pinto County, Texas 76484

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO. 106 has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0013355001, which authorizes the discharge of treated domestic wastewater not to exceed 1,350,000 gallons per day. The facility is located 3,000 feet east of Crabb River Road, approximately one mile south-southeast of the intersection of U.S. Highway 59 and Crabb River Road and east of Tara Boulevard on the north bank of Rabbs Bayou in Fort Bend County, Texas.

LOWER COLORADO RIVER AUTHORITY has applied for a renewal of TPDES Permit No. WQ0013740001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located 3.5 miles east of Columbus, Texas and 1,000 feet south of Interstate Highway 10 on Farm-to-Market Road 102 in Colorado County, Texas 78935.

If you need more information about these permit applications or the permitting process; please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200902888
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 15, 2009

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Texas Facilities Commission

Request for Proposals #303-9-12057

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-9-12057. TFC seeks a 5-year or 10-year lease of approximately 8,047 square feet of office space in Conroe, Texas.

The deadline for questions is August 7, 2009, and the deadline for proposals is August 21, 2009, at 3:00 p.m. The award date is September 30, 2009. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=83739.*

TRD-200902872
Kay Molina
General Counsel
Texas Facilities Commission
Filed: July 14, 2009

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Texas Health and Human Services Commission

Amended Public Notice to Change Effective Date of Payment Rates

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed effective date for this amendment is August 1, 2009. This notice amends the original notice published in the July 3, 2009, issue of the *Texas Register* (34 TexReg 4566) by changing the effective date from September 1, 2009 to August 1, 2009.

The proposed amendment will adjust payment rates for the Primary Home Care (PHC) program to comply with the new federal minimum wage that will increase $0.70 from the current $6.55 per hour to $7.25 per hour on July 24, 2009 and as a result of the 2010-2011 General Appropriations Act (Article II, Health and Human Services, 81st Legislature, Regular Session, 2009), which appropriated general revenue funds for provider rate increases for the PHC Program. The reimbursement methodology will be modified to indicate that for the period beginning August 1, 2009, PHC payment rates will be equal to the payment rates in effect July 31, 2009, plus $0.80 per unit of service.

The proposed adjustment of payment rates is estimated to result in additional annual aggregate expenditures of $11,261,090 for the remainder of federal fiscal year (FFY) 2009 (August 1, 2009, through September 30, 2009), with approximately $7,743,125 in federal funds and approximately $3,517,965 in state general revenue. For FFY 2010, the proposed adjustment of payment rates is estimated to result in additional annual aggregate expenditures of $67,977,122, with approximately $47,482,020 in federal funds and approximately $20,495,102 in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Sarah Hambrick by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1431; by facsimile at (512) 491-1998; or by e-mail at sarah.hambrick@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200902886
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 15, 2009

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Notice of Award of a Major Consulting Contract

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Health and Human Services Commission (HHSC) announces the award of contract 529-06-0425-00039 to **Health Management Associates**, an entity with a principal place of business at 120 N. Washington Square, Suite 705, Lansing, MI 48933. The contractor will provide consulting services regarding the Assessment of the Primary Care Case Management Waiver.

The total value of the contract with **Health Management Associates** is $38,190.00. The contract was executed on July 9, 2009 and will expire on September 30, 2009, unless extended or terminated sooner by the parties. **Health Management Associates** will produce numerous documents and reports during the term of the contract, with the final reporting due by September 30, 2009.

TRD-200902817
David Brown
Assistant General Counsel
Texas Health and Human Services Commission
Filed: July 9, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for 2009 first and second quarter Healthcare Common Procedure Coding System (HCPCS) updates. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for 2009 first and second quarter HCPCS updates are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physician and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902853
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Cardiac Rehabilitation. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for Cardiac Rehabilitation are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8081, which addresses the reimbursement methodology for physicians and refers to 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902854
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Medicaid Program 100 and 200 Fee Reviews. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for Medicaid Program 100 and 200 Fee Reviews are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physician and certain other practitioners; 1 TAC §355.8021(c), which addresses the reimbursement methodology for durable medical equipment (DME) as home health services, and 1 TAC §355.8441(3), relating to the reimbursement methodology for DME under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as Texas Health Steps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902855
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Quarterly Medicaid Fee Reviews. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for Quarterly Medicaid Fee Reviews are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physician and certain other practitioners, with 1 TAC §355.8021(c), which addresses the reimbursement methodology for durable medical equipment (DME) as home health services and 1 TAC §355.8441(3), relating to the reimbursement methodology for DME under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as Texas Health Steps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902856
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Screening, Brief Intervention and Referral to Treatment (SBIRT). The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for SBIRT are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8081, which addresses the reimbursement methodology for psychologists and refers to 1 TAC §355.8085, which addresses the reimbursement methodology

for physicians and certain other practitioners, 1 TAC §355.8091, which addresses the reimbursement methodology for counseling services provided by a licensed professional counselor, a licensed clinical social worker, or a licensed marriage and family therapist; 1 TAC §355.8093 which addresses the reimbursement methodology for physician assistants.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902857
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for subcutaneous injection ports. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for subcutaneous injection ports are proposed to be effective October 1, 2009.

Methodology and Justification. The proposed payment rate was calculated in accordance with 1 TAC §355.8021(c), which addresses the reimbursement methodology for durable medical equipment (DME) as home health services and 1 TAC §355.8441(3), relating to the reimbursement methodology for DME under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program (known in Texas as Texas Health Steps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902858
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Vision Services - Nonsurgical. The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for Vision Services - Nonsurgical are proposed to be effective January 1, 2010.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC §355.8001 which addresses reimbursement for Vision Care Services, 1 TAC §355.8081 which addresses reimbursement for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, and Psychologists' Services, and 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902859
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 18, 2009, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Program for Amplification for Children of Texas (PACT). The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for PACT are proposed to be effective September 1, 2009.

Methodology and Justification. The proposed payment rate was calculated in accordance with 1 TAC §355.8021(c), which addresses the reimbursement methodology for durable medical equipment (DME) as home health services, with 1 TAC §355.8141(b) which addresses the reimbursement methodology for Hearing Aid Services, and 1 TAC §355.8441(3), which addresses the reimbursement methodology for Durable Medical Equipment (DME) under the Early and Periodic Screenings, Diagnosis, and Treatment (EPSDT) Program, known in Texas as Texas Health Steps (THSteps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after August 3, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200902860
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 13, 2009

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on Tuesday, August 11, 2009, at 9:30 a.m. to receive public comment on proposed payment rates for the following programs:

Community Based Alternatives (CBA) and Integrated Care Management (ICM) - Personal Assistance Services;

CBA and ICM Assisted Living/Residential Care (ALRC);

CBA and ICM Personal Care III;

Community Living Assistance and Support Services - Habilitation;

Consolidated Waiver Program - Personal Assistance Services, Day Habilitation, Prevocational Services, Residential Habilitation and Intervener;

Day Activity and Health Services;

Deaf-Blind with Multiple Disabilities Waiver - Day Habilitation, Residential Habilitation-Less Than 24 Hours, Intervener and Chore;

Medically Dependent Children Program - Personal Assistant Services;

Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Personal Care Services (PCS) for Type of Service (TOS) 1;

Primary Home Care;

Residential Care; and

All associated Consumer Directed Services.

The Texas Department of Aging and Disability Services (DADS) operates all of these programs except PCS; HHSC operates PCS.

The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements. This notice of the proposed payment rates is given under Human Resources Code §32.0282(b) and 1 TAC §355.201(e). The public hearing will be held in the Lone Star Conference Room of the Texas Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Meisha Scott by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to adjust the payment rates for the programs and services listed above, except CWP, to account for changes in economic factors such as the new federal minimum wage. The minimum wage will increase $0.70 from the current $6.55 per hour to $7.25 per hour on July 24, 2009. The proposed payment rates will be effective from August 1, 2009, through August 31, 2009.

HHSC proposes to adjust the payment rates for non-Consumer Directed Services in CWP to account for changes in economic factors such as the new federal minimum wage. The proposed payment rates will be effective beginning August 1, 2009.

Finally, HHSC proposes rates for Consumer Directed Services in CWP effective September 1, 2009. DADS is implementing Consumer Directed Services in CWP effective September 1, 2009.

Methodology and Justification. The proposed payment rates for all services listed above except PCS and Consumer Directed Services in CWP were determined in accordance with the rate setting methodol-

ogy codified at 1 TAC §355.109, relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Cost. The proposed payment rates reflect changes in economic factors due to the new federal minimum wage level.

The proposed payment rates for ESPDT PCS were calculated in accordance with the rate setting methodology codified at 1 TAC §355.8441(12)(B), Reimbursement Methodologies for Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services, which addresses the reimbursement methodology for PCS under the EPSDT Program. These proposed payment rates also reflect the changes in economic factors due to the new federal minimum wage level.

The proposed payment rates for Consumer Directed Services in CWP were determined in accordance with the rate setting methodology codified at 1 TAC §355.506, relating to Reimbursement Methodology for Consolidated Waiver Program, 1 TAC §355.114, relating to Consumer Directed Services Payment Option, and 1 TAC §355.109, relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Cost. DADS is implementing Consumer Directed Services in CDS effective September 1, 2009, and requires payment rates before the service can be implemented.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after July 28, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Meisha Scott by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Meisha Scott, Texas Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Meisha Scott at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Meisha Scott, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should call Rate Analysis at (512) 491-1445 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-200902901
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 15, 2009

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit an amendment of the State of Texas Access Reform PLUS (STAR+PLUS) program. HHSC received two Medicaid waivers to operate the STAR+PLUS program, a 1915(b) waiver and a 1915(c) waiver. This amendment affects only the 1915(b) waiver. The amendment would add adult preventive services as a benefit for all eligible adults to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act. As a result, the annual check-ups for adults will be covered through the State Plan and will no longer need to be included as an additional benefit (b)(3) service in the STAR+PLUS (b) waiver.

STAR+PLUS is designed for Texans who are elderly or who have a physical or mental disability and qualify for SSI benefits or for Medicaid due to low income to integrate delivery of acute and long-term care services through a managed care system. The program serves approximately 180,000 SSI and SSI-related aged and disabled Medicaid recipients in Atascosa, Bexar, Comal, Guadalupe, Kendall, Medina, and Wilson Counties (Bexar Service Area); Brazoria, Fort Bend, Galveston, Harris, Montgomery, and Waller counties (Harris/Harris Expansion Service Area); Aransas, Bee, Calhoun, Jim Wells, Kleberg, Nueces, Refugio, San Patricio, and Victoria counties (Nueces Service Area); and Bastrop, Burnet, Caldwell, Hays, Lee, Travis, and Williamson counties (Travis Service Area). The current waiver is scheduled to expire August 31, 2010.

This amendment will not change the cost effectiveness of the waiver.

HHSC is requesting that the waiver amendment be approved effective December 6, 2009 through August 31, 2010.

To obtain copies of the proposed waiver, interested parties may contact Christine Longoria, Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail christine.longoria@hhsc.state.tx.us.

TRD-200902813
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 8, 2009

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit an amendment of the State of Texas Access Reform program, a 1915(b) waiver program, to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act as a result of this amendment, the annual check-ups for adults will be covered through the State Plan and will no longer need to be included as an additional benefit (b)(3) service in the STAR waiver.

The STAR program exists in Bexar, Dallas, El Paso, Harris, Harris Expansion, Lubbock, Nueces, Tarrant and Travis Service Areas. These 9 service areas consist of 52 counties. The principle objectives of the STAR program are early intervention and improved access to quality care, with a special focus on prenatal and well-child care, resulting in improved health outcomes for Medicaid recipients who receive cash assistance (Temporary Assistance for Needy Families (TANF), pregnant women and recipients with limited income with a special focus on prenatal and well-child care.

The current waiver is scheduled to expire June 30, 2010. This amendment will not change the cost effectiveness of the waiver.

HHSC is requesting that the waiver amendment be approved effective December 6, 2009, through June 30, 2010.

To obtain copies of the proposed waiver, interested parties may contact Christine Longoria, Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail christine.longoria@hhsc.state.tx.us.

TRD-200902814

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 8, 2009

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act. The purpose of this amendment is to clarify reasonable limits on the deduction from income of medical expenses for amounts for necessary medical or remedial care not covered under Medicaid. The proposed amendment is effective August 1, 2009.

The proposed amendment will have no fiscal impact on either the state or federal budgets.

To obtain copies of the proposed amendment, interested parties may contact Graciela Reyna by mail at the Texas Health and Human Services Commission, P.O. Box 12668, Mail Code 2090, Austin, Texas 78711-2668; by telephone at (512) 206-4778; by facsimile at (512) 206-5211; or by e-mail at graciela.reyna@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200902829
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: July 10, 2009

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Texas Department of Housing and Community Affairs

Announcement of a Request for Proposal from Investment Banking Firms for Single Family Mortgage Revenue Bond Issues

The Texas Department of Housing and Community Affairs (TDHCA) is issuing this request for proposal (RFP) from investment banking firms interested in providing investment banking services from time to time as Senior Manager or Co-Manager for one or more of its proposed single family mortgage revenue bond new issues and/or refundings. TDHCA desires to revise its list of approved underwriters from which to select its underwriting team for specific municipal bond issues as financing opportunities arise. TDHCA reserves the right to select a team for any particular financing project, from the approved list of Senior Managers and Co-Managers with any combination or number of participants.

Responses to the RFP must be received at TDHCA no later than 4:00 p.m. C.D.T. on Friday, August 7, 2009. To obtain a copy of the RFP, please email your request to the attention of Heather Hodnett at heather.hodnett@tdhca.state.tx.us or visit the Bond Finance Division web page at www.tdhca.state.tx.us.

TRD-200902899
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: July 15, 2009

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Notice of Request for Proposals to Provide a Training and Technical Assistance Academy for the Weatherization Assistance Program

The Texas Department of Housing and Community Affairs (the Department) is requesting proposals to provide a Training and Technical Assistance Academy (Training Academy) for the Weatherization Assistance Program (WAP). Under the American Recovery and Reinvestment Act of 2009, the Department will receive $326,975,732 in additional funding for WAP for a three-year period. As part of the Texas WAP Plan submitted to the U.S. Department of Energy, the Department is exploring the development of a Training Academy for subrecipient, subcontractor and Department staff.

For more information, see the Request for Proposals (RFP) at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=83744. Responses to the RFP are due to the Department on August 7, 2009.

TRD-200902891
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: July 15, 2009

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Texas Lottery Commission

Instant Game Number 1211 "Gold Bar Bonanza"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1211 is "GOLD BAR BONANZA". The play style is "key number match with multipliers".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1211 shall be $10.00 per ticket.

1.2 Definitions in Instant Game No. 1211.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, GOLD BAR SYMBOL, 1X SYMBOL, 2X SYMBOL, 5X SYMBOL, 10X SYMBOL, $10.00, $20.00, $25.00, $50.00, $100, $200, $500, $1,000, $2,500, $25,000, and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1211 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
GOLD BAR SYMBOL	GOLD
1X SYMBOL	WIN1X
2X SYMBOL	WIN2X
5X SYMBOL	WIN5X
10X SYMBOL	WIN10X
$10.00	TEN$

$20.00	TWENTY
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$2,500	25 HUND
$25,000	25 THOU
$100,000	HUN THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $200, or $500.

H. High-Tier Prize - A prize of $1,000, $2,500, $25,000, or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1211), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 050 within each pack. The format will be: 1211-0000001-001.

K. Pack - A pack of "GOLD BAR BONANZA" Instant Game tickets contains 050 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket back 001 and 050 will both be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GOLD BAR BONANZA" Instant Game No. 1211 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GOLD BAR BONANZA" Instant Game is determined once the latex on the ticket is scratched off to expose 34 (thirty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the GOLDEN NUMBERS play symbols, the player wins PRIZE shown for that number. If a player reveals a "gold bar" play symbol, the player wins the PRIZE shown for that symbol instantly. BONUS AREA: If the player reveals a 2X, 5X, or 10X play symbol in the BONUS AREA, the player multiplies their total winnings by that amount. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 34 (thirty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 34 (thirty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 34 (thirty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 34 (thirty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

B. The "GOLD BAR" (auto-win) play symbol will only appear once on winning tickets.

C. No more than four (4) matching non-winning prize symbols will appear on a ticket.

D. No duplicate GOLDEN NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e., 10 and $10).

H. The 2X (win x 2), 5X (win x 5) and 10X (win x 10) BONUS AREA play symbols will only appear on winning tickets as dictated by the prize structure.

I. The 1X BONUS AREA play symbol will appear on all winning tickets that do not utilize the 2X (win x 2), 5X (win x 5) and 10X (win x 10) BONUS AREA play symbols.

J. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "GOLD BAR BONANZA" Instant Game prize of $10.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $200, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "GOLD BAR BONANZA" Instant Game prize of $1,000, $2,500, $25,000, or $100,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GOLD BAR BONANZA" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No lia-

bility for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GOLD BAR BONANZA" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GOLD BAR BONANZA" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1211. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1211 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$10	302,400	16.67
$20	705,600	7.14
$50	100,800	50.00
$100	71,400	70.59
$200	12,642	398.67
$500	3,402	1,481.48
$1,000	252	20,000.00
$2,500	84	60,000.00
$25,000	31	162,580.65
$100,000	5	1,008,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.21. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1211 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1211, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200902830
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 10, 2009

♦ ♦ ♦

Notice of Public Hearing

A public hearing to receive public comments regarding proposed new 16 TAC §401.317 relating to Terminal Printed Instant Game Rule, proposed amendments to 16 TAC §401.301 relating to General Definitions, and proposed amendments to §401.302 relating to Instant Game Rules, will be held on Wednesday, August 5, 2009, at 2:00 p.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, and Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200902827
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 9, 2009

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions and Opportunity for Public Comment

Land Exchange

Caddo Lake State Park - Harrison County

In a meeting on August 27, 2009, the Texas Parks and Wildlife Commission (the Commission) will consider trading approximately one acre of land for one acre of land at Caddo Lake State Park in Harrison County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Will Rogers Memorial Center, Amon G. Carter Jr. Exhibits Hall, South Texas Room/Cactus Room Area, 3400 Burnett Tandy Drive, Fort Worth, Texas 76107. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Acquisition of Conservation Easement

San Jacinto Battleground State Historic Site - Harris County

In a meeting on August 27, 2009, the Commission will consider accepting the donation of a conservation easement on approximately 13.3 acres adjacent to the San Jacinto Battleground State Historic Site in Harris County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Will Rogers Memorial Center, Amon G. Carter Jr. Exhibits Hall, South Texas Room/Cactus Room Area, 3400 Burnett Tandy Drive, Fort Worth, Texas 76107. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-200902895
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: July 15, 2009

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37213 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the City Limits of Grapevine, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800)735-2989. All inquiries should reference Project Number 37213.

TRD-200902880
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on July 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cebridge Acquisition, L.P. d/b/a Suddenlink Communications for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37216 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the City Limits of Oakridge and Whitehouse, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37216.

TRD-200902881
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 10, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37217 before the Public Utility Commission of Texas.

The requested amendment is to expand the service area footprint to include the City Limits of Robinson, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800)735-2989. All inquiries should reference Project Number 37217.

TRD-200902883
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Application for Relinquishment of ETC Designation

Notice is given to the public of an application filed with the Public Utility Commission of Texas on July 9, 2009, for designation as an eligible telecommunications carrier (ETC) and application for relinquishment of ETC designation pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Telenational Communications, Inc. for Designation as an ETC in Areas Served by Cedar Valley Communications and Application of Cedar Valley Communications for Relinquishment of its ETC Designation. Docket Number 37205.

The Application: Telenational Communications, Inc. is requesting designation as an ETC in those areas in which Cedar Valley Communications currently is designated as an ETC. Simultaneously, Cedar Valley Communications requests relinquishment of its ETC designation in those areas in which it is currently so designated effective on the date of its merger into Telenational Communications, Inc.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by August 13, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 37205.

TRD-200902879
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 7, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Public Wireless, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 37190 before the Public Utility Commission of Texas.

Applicant intends to provide transport of radio signals for wireless carriers.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 29, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37190.

TRD-200902837
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 13, 2009

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 10, 2009, to amend a certificate of convenience and necessity for a proposed transmission line in Uvalde and Medina Counties, Texas.

Docket Style and Number: Application of Electric Transmission Texas, LCC to Amend a Certificate of Convenience and Necessity to Construct a Proposed Uvalde to Castroville 138 kV Transmission Line within Uvalde and Medina Counties, Texas. Docket Number 36978.

The Application: The application of Electric Transmission Texas, LCC (ETT) for a proposed transmission line is designated the Uvalde to Castroville 138 kV Transmission Line Project. ETT stated the proposed transmission line is a joint project between ETT and CPS Energy. This project is recommended by the Electric Reliability Council of Texas (ERCOT) and involves the construction of a new 138 kV double-circuit capable transmission line between the existing AEP Texas Central Company's Uvalde Substation and the existing CPS Energy Castroville Substation. ETT will own, construct, operate, and maintain the portion of the project from the Uvalde Substation to the interconnection point with CPS Energy's portion of the project. This application refers to ETT's portion of the project only. The miles of right-of-way for this project will be approximately 70.44 miles (preferred route). The estimated date to energize facilities is April 2012.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is August 24, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36978.

TRD-200902878

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Notice of Petition for Rulemaking to Amend Cost Recovery Rules for Transmission Service Providers in ERCOT

On July 10, 2009, AEP Texas North Company (TNC), AEP Texas Central Company (TCC), Electric Transmission Texas, LLC (ETT), Sharyland Utilities, LP (Sharyland), LCRA Transmission Services Corporation (LCRA TSC), and Texas-New Mexico Power Company (TNMP) (Petitioners) filed a petition for rulemaking requesting that the commission initiate a rulemaking proceeding to make changes to its cost recovery rules for transmission service providers (TSPs) in the Electric Reliability Council of Texas (ERCOT). According to the Petitioners, these changes would provide TSPs more timely recovery of their transmission investments, under §35.004(d) of the Public Utility Regulatory Act, Texas Utilities Code §§11.001 - 66.016 (Vernon 2007 and Supp. 2008) (PURA).

Specifically, Petitioners propose changes to the cost recovery rules so that: 1) allowed interim transmission cost of service (TCOS) filings are increased from once annually to no more than twice per calendar year; and 2) interim TCOS cases will be eligible for administrative approval and, if uncontested, shall be approved by the administrative law judge (ALJ) without the need for an order from the Commissioners. The new rates would take effect on the ALJ's approval.

The Petitioners assert that the proposed changes are projected to both reduce costs to consumers and help alleviate the adverse financial effects on TSPs that result when new transmission assets are not reflected in rates until well after they enter service. These changes allegedly will also help more closely align the TSPs' effective returns on investment to their allowed returns. The Petitioners feel that achieving these objectives is especially important because the TSPs will undertake substantial transmission construction over the next five to ten years, including the build-out of the competitive renewable energy zone (CREZ) projects required by the Legislature.

The petition is assigned Project Number 37221 - *Petition for Rulemaking to Amend Cost Recovery Rules for Transmission Service Providers in ERCOT.* Under the Administrative Procedure Act, Texas Government Code §2001.021, the commission shall either deny the petition in writing, stating its reasons for denial, or initiate a rulemaking proceeding not later than the 60th day after the date the petition is filed.

Comments on the petition may be filed no later than 3:00 p.m. on Friday, August 14, 2009. The commission requests specific comments on the commission's authority to adopt such a rule. Copies of the petition may be obtained from the commission's Central Records Division, William B. Travis Building, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or through the Interchange on the commission's web site at www.puc.state.tx.us. All inquiries and comments concerning this petition for rulemaking should refer to Project Number 37221.

Questions regarding this notice of petition should be directed to Mick Long, Attorney, Legal Division, at (512) 936-7294. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989.

TRD-200902892

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2009

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Public Notice of Request for Comment Regarding Retail Electric Providers Disclosure to Customers

The staff of the Public Utility Commission of Texas (commission) request comments regarding a strawman rule which repeals and amends Chapter 26, Subchapter D, §26.89, relating to Information Regarding Rates and Services of Nondominant Carriers and all rules under Subchapter E, relating to Certification, Licensing and Registration. Project Number 35246, *Rulemaking Regarding P.U.C. Substantive Rules, Chapter 26, Subchapter D, §26.89 and Subchapter E, §§26.101, 26.102, 26.103, 26.107, 26.109, 26.111, 26.113, and 26.114,* has been assigned to this proceeding.

The commission staff strawman rule will be filed in Central Records under Project Number 35246 by Friday, July 24, 2009. The commission requests interested persons file written comments on this strawman rule.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 by Friday, August 14, 2009, and reply comments may be filed by Friday, August 21, 2009. All responses should reference Project Number 35246.

Questions concerning the comments or this notice should be referred to Shelah J. Cisneros, Legal Division, (512) 936-7265. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200902893
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2009

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Public Notice of Workshop on Improved Customer Information on Distributed Generation

The staff of the Public Utility Commission of Texas (commission) will hold a workshop at 9:00 a.m. on Monday, August 24, 2009, in Hearing Room A, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas, regarding modifications to its Power to Choose website. Project Number 37189, *Improved Customer Information on Distributed Generation,* has been established for this proceeding. As directed by the 81st Legislature, the commission will be expanding the Power to Choose website to include educational materials on distributed renewable generation (DRG), easily comparable information about whether and at what rates retail electric providers have offers for the purchase of DRG out-flows, and information about renewable energy credit marketers and the contract terms they offer. The commission shall also make available on the website information about DRG rebates and tax incentives offered by utilities, the state of Texas, and the federal government.

Questions concerning the workshop or this notice should be referred to David Smithson, Retail Market Analyst, Competitive Markets Division, (512) 936-7156. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200902894

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 15, 2009

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Request for Comments on Form for an Application for, or Amendment to, a Retail Electric Provider Certification Pursuant to P.U.C. Substantive Rule §25.107

The staff of the Public Utility Commission of Texas (commission) requests comments regarding its new form for Application for, or Amendment to, a Retail Electric Provider (REP) Certification pursuant to new P.U.C. Substantive Rule §25.107, regarding Certification of Retail Electric Providers (REPs). The commission intends for the form to conform to new P.U.C. Substantive Rule §25.107, to reduce confusion for applicants, and to assist commission staff in its review of REP certification applications and amendments. Project No. 37053, *Interim and Final Approval of Retail Electric Provider (REP) Certification Form and REP Annual Report,* has been established for this proceeding.

Comments may be filed by submitting 16 copies no later than 3:00 p.m., Monday, August 24, 2009, to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. All comments should reference Project No. 37053.

Questions concerning Project Number 37053 should be referred to Ms. Janis Ervin, Infrastructure and Reliability Division, (512) 936-7372 or Mr. Patrick Peters, Legal Division, (512) 936-7232. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200902862
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 13, 2009

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Request for Comments on Rulemaking Relating to the Obligations of Telephone and Electric Service Providers Under the Texas Prompt Payment Act

The staff of the Public Utility Commission of Texas (commission) has initiated a proceeding to conduct a rulemaking relating to the obligations of telephone and electric service providers (provider) under the Texas Prompt Payment Act, Texas Government Code §2251.001 *et seq* (PPA). Project Number 36260, *Rulemaking Relating to the Obligations of Telephone and Electric Service Providers Under the Texas Prompt Payment Act,* has been established for this proceeding. Commission staff requests interested persons to comment on the following questions.

1. Should the commission amend P.U.C. Substantive Rule §§26.27(a)(2), 26.27(b)(2), 25.28(b) and 25.480(c) to require notice by the customer to its provider that it is eligible for PPA billing?

a. If yes, what form should this notice take?

b. If no, should the commission amend P.U.C. Substantive Rule §§26.27(a)(2), 26.27(b)(2), 25.28(b) and 25.480(c) to require a provider to inquire as to whether a customer is eligible for PPA billing? If yes, what form of proof should be required from the customer?

2. Should the commission amend P.U.C. Substantive Rule §§26.27(a)(2), 26.27(b)(2), 25.28(b), and 25.480(c) to include a requirement that the customer dispute an incorrect invoice from a utility as required by the PPA?

Responses and comments may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Initial responses and comments will be accepted no later than Friday, August 14, 2009 (21 days of the date of publication of this notice); reply responses and comments will be accepted no later than Friday, August 21, 2009 (28 days of the publication of this notice). All comments should reference Project Number 36260.

Questions concerning this request for comments should be referred to Susan E. Goodson, Attorney, Legal Division, (512) 936-7292. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200902877
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 14, 2009

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Texas Residential Construction Commission

Notice of Applications for Designation as a "Texas Star Builder"

The Texas Residential Construction Commission (commission) adopted rules regarding the procedures for designation as a "Texas Star Builder" at 10 TAC §303.300. The rules were adopted pursuant to §416.011, Property Code (Act effective September 1, 2003), which provides that the commission shall establish rules and procedures through which a builder can be designated as a "Texas Star Builder." The commission rules for application for designation can be found on the commission's website at www.trcc.state.tx.us.

10 TAC §303.300(i)(2) requires the commission to publish in the *Texas Register* notice of the application of each person seeking to become designated as a "Texas Star Builder" registered under this subchapter. The commission will accept public comment on each application for twenty-one (21) days after the date of publication of the notice. Information provided in response to this notice will be utilized in evaluating the applicants for approval. The "Texas Star Builder" designation requires that a builder or remodeler demonstrate that its education, experience and commitment to professionalism sets the builder or remodeler apart from its peers and offers some assurance to its customers that its quality of service and construction will be above average.

Pursuant to 10 TAC §303.300(i)(2), the commission hereby notices the application(s) for designation as a "Texas Star Builder" of:

Meyerson Custom Homes, LP, 115 East North Main Street, Flatonia, Texas 78941. Meyerson Custom Homes, LP holds TRCC builder registration #2197. The applicant's registered agent is Sanford Meyerson.

Affordable Homes of South Texas, Inc., 1420 Erie Avenue, McAllen, Texas 78501; Affordable Homes of South Texas, Inc. holds TRCC builder registration certificate #6146. The applicant's registered agent is Robert Calvillo.

Interested persons may send written comments regarding this application to Susan K. Durso, General Counsel, The Texas Residential Construction Commission, P.O. Box 13509, Austin, TX 78711-3509. Comments regarding this application will be accepted for twenty-one (21) days following the date of publication of this notice in the *Texas Register.* Thereafter, the comments will not be considered as timely filed.

TRD-200902816
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: July 9, 2009

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Rio Grande Council of Governments

Request for Proposal

The Rio Grande Council of Governments (RGCOG) seeks to contract with a firm/consultant to provide professional services for Human Resources. A copy of the RGCOG Request for Proposals may be obtained with a written request via email or fax attn: Mary Alvarado, RGCOG Executive Secretary, email: marya@riocog.org or fax at (915) 532-9385.

Completed proposals must be received by the RGCOG no later than 5:00 p.m. MDT on July 27, 2009 in order to be considered. RGCOG reserves the right to negotiate with any and all consultants or firms that submit proposals as per the Government Code, Chapter 2254.

The RGCOG is an Affirmative Action/Equal Opportunity Employer.

Annette Gutierrez

Executive Director

Rio Grande Council of Governments

(915) 533-0998, ext. 114

1100 N. Stanton, Suite 610

El Paso, TX 79902

TRD-200902852
Annette Gutierrez
Executive Director
Rio Grande Council of Governments
Filed: July 13, 2009

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Texas Department of Transportation

Notice of Intent - United States Highway (US) 281, Bexar County, Texas

Pursuant to 43 TAC §2.5(e)(2), the Texas Department of Transportation (department), in cooperation with the Federal Highway Administration (FHWA) and Alamo Regional Mobility Authority (Alamo RMA), is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed transportation project. The scope of the project is United States Highway (US) 281 from Loop (LP) 1604 to Borgfeld Road, about 7.5 miles, in Bexar County, Texas. Areas within the city of San Antonio are included in the study area.

US 281 within the project limits is listed in the San Antonio-Bexar County Metropolitan Planning Organization (SA-BCMPO) Mobility 2030 Plan (the long-range transportation plan) as a six-lane tolled facility; other solutions for improving mobility within the US 281 corridor may be identified in future updates and/or amendments to the long-range transportation plan. The existing facility is a four-to-six-lane non-toll divided arterial with partial access controls. The need for improvements to US 281 has resulted from a historic and continuing trend in population and employment growth within the project corridor and surrounding areas. This growth has generated increasing levels of vehicle miles traveled, leading to higher levels of traffic congestion, vehicle crashes, and declining community quality of life. Without additional transportation improvements it is anticipated that this population and employment growth will result in increased levels of vehicular traffic, crashes, and travel delays. Without improvements, accessibility within the corridor is anticipated to become increasingly reduced, its functionality as part of a regional transportation system would decline, and the overall community quality of life would diminish. The objectives of US 281 corridor improvements are to improve mobility, enhance safety, and improve community quality of life.

The EIS will evaluate potential impacts from construction and operation of the project, including, but not limited to, the following: impacts or potential displacements to residents and businesses; detours; air and noise impacts from construction equipment, and operation of the project; water quality impacts from the construction area and from roadway storm water runoff; impacts to waters of the United States; impacts to historic and archeological resources; impacts to floodplains; impacts to socio-economic resources (including environmental justice and limited English proficiency populations); indirect impacts; cumulative impacts; land use; vegetation; wildlife; and aesthetic and visual resources.

The Alamo RMA will consider several alternatives intended to satisfy the identified need and purpose. The alternatives will include the no-build alternative, Transportation System Management/Transportation Demand Management, mass transit, and roadway build alternatives. The roadway build alternatives may include limited access and non-limited access designs, and toll and non-toll lanes.

The project may require the following approvals by the federal government: United States Army Corps of Engineers (USACE) Section 404; Section 401 Water Quality Certification; and National Pollutant Discharge Elimination System (NPDES). The actual approvals required may change after the Alamo RMA completes field surveys, conducts public involvement activities, and recommends a preferred alternative for the project.

A scoping meeting is an opportunity for participating agencies, cooperating agencies, and the public to be involved in defining the need and purpose for the proposed project, to assist in determining the range of alternatives for consideration in the draft EIS, and to comment on methodologies to evaluate alternatives. Public scoping meetings are planned for late summer and fall of 2009. The Alamo RMA will publish notice that scoping meetings will be held. The notice will be published in newspapers of general circulation in the project area at least 30 days prior to the meetings, and again approximately 10 days prior to the meetings.

The Alamo RMA will complete the procedures for public participation and, in coordination with the department, complete the procedures for coordination with other agencies as described in one or both of the National Environmental Policy Act and state law. In addition to scoping meetings, the Alamo RMA will hold a series of meetings to solicit public comment during the environmental review process. They will be held during appropriate phases of the project development process. Public notices will be given stating the date, time, and location of the meeting or hearing and will be published in English as well as Spanish. Provision will be made for those with special communication needs, including translation if requested. The Alamo RMA will also send correspondence to federal, state, and local agencies, and to organizations and individuals who have previously expressed or are known to have an interest in the project, which will describe the proposed project and solicit comments. The Alamo RMA and department invite comments and suggestions from all interested parties to ensure that the full range of issues related to the proposed project are identified and addressed. Comments or questions should be directed to the Alamo RMA and department at the addresses set forth below.

A proposed schedule for completion of the environmental review process is not available.

Alamo RMA Contact: Lisa Adelman, Legal Counsel to the Alamo RMA, 1222 N. Main Avenue, 10th Floor, San Antonio, Texas 78212; phone (210) 495-5499.

Department Contact: Dianna F. Noble, P.E., Director of Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; phone (512) 416-2734.

TRD-200902897
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: July 15, 2009

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Notice of Public Hearings on Proposed Restrictions on Use of State Highway

The Texas Department of Transportation (department) will conduct public hearings to receive comments on a proposed restriction initiated by the department establishing lane use restrictions for certain classes of vehicles on the following highways:

1. Interstate Highway 20 in Tarrant, Dallas and Kaufman Counties from United States Highway 377 in the city of Fort Worth to Farm to Market Road 740 in the city of Mesquite;

2. Interstate Highway 30 in Tarrant County from Dale Lane in the city of Fort Worth to Farm to Market Road 157 in the city of Arlington;

3. Interstate Highway 820 in Tarrant County from Westpoint Boulevard in the city of Fort Worth to Interstate Highway 20 in the city of Fort Worth; and

4. Interstate Highway 45 in Dallas and Ellis Counties from Interstate Highway 30 in the city of Dallas to Farm to Market Road 3413 in the city of Ennis.

In accordance with Transportation Code, §545.0651 and 43 TAC §§25.601 - 25.604, the department is proposing to initiate a lane use restriction applicable to trucks, as defined in Transportation Code, §541.201, with three or more axles, and to truck tractors, also as defined in Transportation Code, §541.201, regardless of whether the truck tractor is drawing another vehicle or trailer. The proposed restriction would prohibit those vehicles from using the left or inside lane on the following highways:

1. Interstate Highway 20 from United States Highway 377 in the city of Fort Worth extending to Farm to Market Road 740 in the city of Mesquite;

2. Interstate Highway 30 from Dale Lane in the city of Fort Worth extending to Farm to Market Road 157 in the city of Arlington;

3. Interstate Highway 820 from Westpoint Boulevard in the city of Fort Worth extending to Interstate Highway 20 in the city of Fort Worth; and

4. Interstate Highway 45 from Interstate Highway 30 in the city of Dallas extending to Farm to Market Road 3413 in the city of Ennis.

The proposed restrictions would apply 24 hours a day, 7 days a week, and would allow the operation of those vehicles in a prohibited traffic lane for the purposes of passing another vehicle or entering or exiting the highway.

In accordance with 43 TAC §25.604, the Texas Department of Transportation will evaluate the impact of the proposed restriction's compliance with the requirements of Transportation Code, §545.0651 and 43 TAC §§25.601 - 25.604, and will hold public hearings to receive comments on the proposed restriction. The hearings, preceded by a 30 minute open house, will be held at the following times and locations:

1. Ennis High School, 2301 Ensign Road, Ennis, Texas 75119, on Monday, August 10, 2009 at 6:30 p.m.

2. Fort Worth Intermodal Transportation Center, 1001 Jones Street, Fort Worth, Texas 76102, on Tuesday, August 11, 2009 at 6:30 p.m.

3. Lancaster City Hall, 211 N. Henry Street, Lancaster, Texas 75146, on Wednesday, August 12, 2009 at 6:30 p.m.

All interested citizens are invited to attend any of the hearings and to provide input. Those desiring to make official comments may register starting at 6:00 p.m. Oral and written comments may be presented at any of the public hearings and written comments may be submitted by regular postal mail during the 30-day public comment period. Written comments may be submitted to Maribel Chavez, P.E., District Engineer, Fort Worth District, Texas Department of Transportation, 2501 SW Loop 820, Fort Worth, Texas 76133. The deadline for receipt of written comments is 5:00 p.m. on August 24, 2009.

Persons with disabilities who plan to attend the public hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, or non-English speakers, readers, large print, or Braille, are requested to contact Jahnae Stout at (817) 608-2335 at least two business days prior to the hearing so that appropriate arrangements can be made. For more information concerning the public hearing, please contact Jahnae Stout.

TRD-200902898
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: July 15, 2009

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Notice of Request for Proposal

The Texas Department of Transportation (department) announces a Request for Proposal (RFP) for:

1. State Planning Assistance

2. Rural Transportation Assistance

3. Intercity Bus

4. Rural Discretionary

5. Job Access Reverse Commute

6. New Freedom

These public transportation projects will be funded through the Federal Transit Administration (FTA) §§5304, 5311(b)(3), 5311(f), and 5311 - Discretionary programs, §5316, and §5317. It is anticipated that multiple projects from multiple funding programs will be selected for State Fiscal Year 2011. Project selection will be administered by the Public Transportation Division (PTN). Selected projects will be awarded in the form of grants, with payments made for allowable reimbursable expenses or for defined deliverables. The proposer will become a subrecipient of the department.

Purpose: The RFP invites proposals for services to develop, promote, coordinate, or support public transportation. The objectives for these proposals are to support the nonurbanized and small urban areas of Texas, to support services to meet the intercity travel needs of residents, or to support the infrastructure of the public transportation network through planning, marketing assistance, local match assistance,

and vehicle capital and facility investment. In the process of meeting these objectives, projects are also to support and promote the coordination of public transportation services across geographies, jurisdictions, and program areas. Coordination between nonurbanized and urbanized areas and between client transportation services and other types of public transportation are particular objectives.

Eligible Projects: Eligible types of projects have been defined by the department in accordance with FTA guidelines, other laws and regulations, and in consultation with members of the public transportation and the intercity bus industries. These include projects for vehicle capital, planning, marketing, facilities, training, technical and operating assistance, and research.

Eligible Applicants: Proposers shall be required to enter into a grant agreement as a subrecipient of the department. Eligible subrecipients include state agencies, local public bodies and agencies thereof, private-nonprofit organizations, operators of public transportation services, private consultants, state transit associations, transit districts, and private for-profit operators.

Availability of Funds: In accordance with Transportation Code, Chapter 455, the department currently provides funding for public transportation projects, funded through FTA §5304 State Planning Assistance, §5311(b)(3) Rural Transportation Assistance, §5311(f) Intercity Bus program, §5311 - Rural Discretionary programs, §5316 Job Access Reverse Commute, and §5317 New Freedom. The department will also consider offering transportation development credits to assist with some local match needs for capital projects.

Review and Award Criteria: Proposals will be evaluated against a matrix of criteria and then prioritized. Subject to available funding, the department is placing no preconditions on the number or on the types of projects to be selected for funding. The department reserves the right to conduct negotiations pertaining to a proposer's initial responses including but not limited to specifications, and prices. An approximate balance in funding awarded to the types of projects, or an approximate geographic balance to selected projects, may be seen as appropriate, depending on the proposals that are received. The department may consider these additional criteria when recommending prioritized projects to the Texas Transportation Commission.

Key Dates and Deadlines:

November 16, 2009: Written questions for the proposal are due to PTN.

November 25, 2009: Written responses to questions posted on PTN website and mailed to all firms who submitted questions.

December 21, 2009: Deadline for receipt of proposals.

March 1, 2010: Target date for the department to complete the evaluation, prioritization, and negotiation of proposals.

April 30, 2010: Target date for presentation of project selection recommendations to the Texas Transportation Commission for their action.

July to September, 2010: Target date for all project grant agreements to be executed, with approved scopes of work and calendars of work.

To Obtain a Copy of the RFP: The RFP will be posted on the Public Transportation Division website at http://www.txdot.gov/business/governments/grants/public_transportation.htm. Proposers with questions relating to the RFP should contact Cheryl Mazur at cmazur@dot.state.tx.us or by phone at (512) 374-5234.

TRD-200902896
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: July 15, 2009

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of Alba, P.O. Box 197, Alba, Texas 75410, received April 29, 2009 for financial assistance in the amount of $1,300,000 from the Texas Water Development Fund.

Coastal Water Authority, 500 Dallas Street, Houston, Texas 77002, received April 2009 for financial assistance in the amount of $5,115,000 from the Water Infrastructure Fund.

San Antonio Water System on behalf of the City of San Antonio, P.O. Box 2449, San Antonio, Texas 78298, received June 30, 2008 for financial assistance in the amount of $35,000,000 from the Water Infrastructure Fund.

TRD-200902818
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: July 9, 2009

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).